S. HRG. 98-789

COASTAL ZONE MANAGEMENT

HEARING

BEFORE THE

NATIONAL OCEAN POLICY STUDY

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 2324

TO AMEND THE COASTAL ZONE MANAGEMENT ACT OF 1972 REGARDING ACTIVITIES DIRECTLY AFFECTING THE COASTAL ZONE

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COASTAL ZONE MANAGEMENT

WEDNESDAY, MARCH 28, 1984

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
NATIONAL OCEAN POLICY STUDY,
Washington, D.C.

The committee and the study met, pursuant to notice, at 9 a.m., in room SR-253, Russell Senate Office Building, the Hon. Bob Packwood (chairman of the committee) presiding.

Staff members assigned to this hearing: James Gilmore, professional staff member; and Deborah Stirling and James Drewry, minority staff counsels.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. The committee will come to order, please.

We are today considering changes in the Coastal Zone Management Act caused by a recent Supreme Court decision. In Oregon, it is a subject that we are very familiar with, because we have an area called Gorda Ridge where the Department of the Interior is thinking of making leases.

I cannot guarantee they are going to, but they are thinking about it, and with the recent Supreme Court decision, Oregon would be hard pressed with its very extensive and good coastal zone management plan to object to Federal activities in that area.

It is the subject of Federal activities that is really the subject of this hearing, because the statute under consideration reads as follows: "Each Federal agency conducting activities directly affecting the coastal zone shall conduct those activities in a manner which is to the maximum extent practicable consistent with the approved State management programs."

That is the section, one of the sections that the Supreme Court interpreted in its decision of 2 months ago. In interpreting that section of the Coastal Zone Act, the Supreme Court said that oil and gas leases are not an activity affecting the coastal zone. As they determined it was not an activity affecting the coastal zone, they did not have to get to the issue if they did not want to of whether or not such activity would be consistent with the State's coastal zone management plan, because you only have to be consistent with the plan if the activity affects the coastal zone.

Now, admittedly, the Supreme Court was dealing with oil and gas leases, not oil and gas drilling. They could have left the decision there, but they went further, and in deciding in a very broad decision beyond what was before the Court, they in addition said that any Federal activity outside of the coastal zone was not in-

tended by Congress to be subject to the States coastal zone management plan.

Any Federal activity. That means the Federal Government can decide to dump hazardous wastes or sink old nuclear submarines, or go into the oil and gas business themselves, rather than through leases, and it would be beyond the purview of any State to have any say, because it would be Federal activity, and thus beyond the Coastal Zone Management Act reach.

I do not think that is what Congress intended when we passed the Coastal Zone Management Act 12 years ago, but this hearing today is not to quarrel with what the Supreme Court did. I disagree with them. I do not think they read the act the way we intended it. But their decision is not a constitutional decision. It is one of statutory interpretation. It is one that this Congress can change if we choose to do so.

I hope that we do so, because we very, very clearly meant for the Federal Government and the States together to coordinate and plan the activities that take place in the entire 200-mile economic zone if any of those activities have an effect or might have an effect upon the coastal zone. And that is the issue that we are addressing ourselves to today.

[The bill follows:]

[S. 2324, 98th Cong., 2d sess.]

A BILL, To amend the Coastal Zone Management Act of 1972 regarding activities directly affecting the coastal zone

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 307(c)(1) of the Coastal Zone Management Act of 1972 (16 U.S.C. 1456(c)(1)) is amended to read as follows:

"(c)(1)(A) Each Federal agency conducting or supporting an activity (whether within, or landward or seaward of, the coastal zone) that directly affects the coastal zone shall conduct or support that activity in a manner which is fully consistent with approved State management programs, unless the Federal activity is—

"(i) undertaken to counter the immediate effects of a declared national emergency;

"(ii) necessary for reasons of national security; or

"(iii) required by any provision of a Federal law which prevents consistency with any provision of an approved State coastal zone management program.

Any Federal activity which is not required to be fully consistent pursuant to clause (i), (ii), or (iii) of this subparagraph must be consistent, to the maximum extent possible, with approved State coastal zone management programs.

"(B) For purposes of subparagraph (A) of this paragraph, a Federal agency activity shall be treated as one that 'directly affects the coastal zone' if the conduct or support of the activity either—

"(i) produces identifiable physical, biological, social, or economic consequences in the coastal zone; or

"(ii) initiates a chain of events likely to result in any of such consequences.".

The CHAIRMAN. Senator Goldwater.

Senator GOLDWATER. Well, in Arizona we do not have a lot of coastal problems, but I am very interested in this bill. Like you, I would not like to see our coasts destroyed.

The CHAIRMAN. Thank you.

We will start out with a panel today, Dr. John Byrne, the Administrator of the NOAA, and Mr. William Bettenberg, the Director of the Minerals Management Service of the U.S. Department of the Interior.

Gentlemen, welcome.

We are delighted to have Senator Nunn of Georgia join us today.

Gentlemen, go right ahead.

STATEMENTS OF HON. JOHN V. BYRNE, ADMINISTRATOR, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE, ACCOMPANIED BY PETER TWEEDT, DIRECTOR, OFFICE OF OCEANIC AND COASTAL ZONE MANAGEMENT RESOURCES; AND WILLIAM BETTENBERG, DIRECTOR, MINERALS MANAGEMENT SERVICE, DEPARTMENT OF THE INTERIOR

Mr. BYRNE. Thank you very much. If it is agreeable, I will start with my testimony, and then Mr. Bettenberg will present his, and then we——

The CHAIRMAN. John, I will advise you, as I have before, your statement in full will be in the record. It will be the preference of this committee for you and all of the witnesses to abbreviate your statement and make the main points. None of the statements today, with one exception, are overly long statements, but to the extent we could have time for questions rather than listening to you read the statement verbatim, we would appreciate it.

Mr. BYRNE. I will make an attempt to do that, Senator.

I welcome the opportunity to be here today to address this issue, which, I think all of us agree, is an extremely important one.

There is no question that the coastal zone of the United States is among the most important areas of the Earth's surface. Certainly we wish to see that the resources of that zone are wisely developed. At the same time, we want to insure that the development does not in a way negatively influence the activities of the coastal zone and that these activities will be available for future generations.

We are here today to address S. 2324, which attempts to clarify and to change the interpretation of the Supreme Court decision. The bill would apply to any Federal activity, whether occurring seaward or landward of the coastal zone, and we think that is an important consideration. It also attempts to define the term "directly affecting" by stating that it is an activity which either produces identifiable physical, biological, social, or economic consequences in the coastal zone or initiates a chain of events likely to result in such consequences to the coastal zone.

Federal activities which meet a number of criteria must still be consistent, to the maximum extent possible, with approved State's coastal zone plans, unless such activities would affect a declared national emergency, or would be exempted for reasons of national security or because of other Federal law.

As part of this administration, NOAA is here to testify today in opposition to the proposed legislation on the grounds that we do not believe that it is essential at this time. We do support a strong State-Federal partnership, one which will manage wisely the resources of the coastal zone and will advance the national interest in the effective management, use, protection, and development of the coastal zone.

We think that, to this point, State-Federal collaboration efforts have been reasonably good. Such coordination and consultation, combined with a strong State role in managing the resources of the zone, is a fundamental objective of the Coastal Zone Management

Act. The procedures which have been used and which are used to date to carry out consistency reviews have been working well.

We have a series of activities we follow which essentially puts the burden on the Federal agency to indicate whether or not its activities are consistent with the approved coastal zone plans. The States have the opportunity to disagree with that assessment. If the State disagrees with the Federal agency's consistency determination, and the disagreement cannot be resolved in an informal way, then the Federal agency may proceed with its activities, and the State can stop those activities through a court order.

To date, that procedure has, as I say, worked reasonably well. We, as the executive branch of Government, do support the Court's conclusion that Outer Continental Shelf lease sales are not subject to Federal consistency provisions. Although the Supreme Court's decision removed the OCS lease sale from review under section 307(c)(1), NOAA does not believe that the ruling creates a pressing need for congressional action at this time.

The Coastal Zone Management Act is one which operates in coordination with other acts of this Government, other laws of this Government. We think that, together, a reasonably good system has been developed. We applaud the recent activities of Secretary Clark in attempting to build a more meaningful consultative mechanism in the business of OCS leasing.

This is done through review and consultation procedures provided by section 19 of the Outer Continental Shelf Lands Act.

We also commend the Department of the Interior for the numerous memoranda of understanding which they have developed with the States to improve the working relationship in this regard. It is our belief that a legislative definition of "directly affecting" is not needed.

Federal consistency has worked in accordance with the regulations that NOAA has established. In fact, the recent review carried out by NOAA's Office of Ocean and Coastal Resource Management of Federal consistency actions during 1982 alone has indicated that of 8,900 actions, only 165 were objected to or were found to be of nonconcurrence. This is less than 2 percent of all the actions involved.

Where the system has presented particular problems, litigation has taken place. The litigation history of the consistency provisions provides additional evidence that the system works. In the 12 years that the Coastal Zone Management Act has been in force, there have been only 23 lawsuits brought against Federal agencies on consistency grounds.

Of these, nine of the cases involved OCS leasing, and two involved other activities seaward of the State's coastal zone. Five of the cases involved activities in Federal enclaves within the zone, and an additional seven were cases that involved activities including permits within the coastal zone.

Because the Supreme Court has taken an action which calls for a change in our regulations, NOAA has submitted an advance notice of proposed rulemaking [ANPR] to the Office of Management and Budget for clearance. We initiated the procedure of developing the ANPR very shortly after the Supreme Court decision. In this procedure, we have consulted with all concerned Federal agencies con-

cerning the scope of the proposed rulemaking, and, as a result of those discussions, have sent to OMB an advance notice for their approval.

I would like to dwell a little bit on this. The advance notice states that references in existing NOAA regulations which identify OCS lease sales as activities directly affecting the coastal zone and covered by section 307(c)(1) will be removed from the regulations. These modifications respond to the Supreme Court's clear ruling.

Beyond these changes, the ANPR does not propose any modifications at this time which would expand the impact of the Court's decision beyond OCS lease sales. Rather, the ANPR solicits the views of all interested parties on: (1) how activities other than OCS lease sales are affected by the Court's decision; (2) on the need for a further regulatory definition of "directly affecting"; and (3) on other Federal consistency regulations which may require modifications.

The ANPR also requests suggestions as to how the NOAA regulations could better encourage State-Federal collaboration at the earliest formative stages of Federal activities in the zone. We believe that this particular advance notice will be published in early May. Once the notice is in effect, we will conduct public meetings in at least four regions of the country to solicit comments from all those who are concerned and who have something responsible to add to the dialog.

The rulemaking will provide an opportunity to gather important information which we think is needed. In addition to that, we are prepared to engage in a study of the entire system for rulemaking in this area. We are considering supporting a comprehensive State-Federal study of the experience gained to date in applying Federal consistency provisions.

Such a study could identify and document problem areas. Examples of success could form the basis for reasoned revisions to both the Coastal Zone Management Act and the implementing regulations. We believe that this study should be carried out in any case prior to the reauthorization hearings on this act, which are scheduled for 1985. The information will be useful at that time, and we are convinced that on the basis of both the rulemaking and the study, we will be able to improve the Coastal Zone Management Act.

So, although we are supportive of the act, we do take exception to this particular legislation. We believe that, because the system generally works well, we see little need for the legislation at this time. Therefore NOAA is testifying in opposition to S. 2324, Mr. Chairman.

Thank you.

[The statement follows.]

STATEMENT HON. OF JOHN V. BYRNE, ADMINISTRATOR, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

Mr. Chairman, Members of the Committee, I welcome the opportunity to testify today on S. 2324, a bill to amend Section 307(c)(1) of the Coastal Zone Management Act of 1972, as amended (CZMA). The proposed legislation is a response to the January decision of the Supreme Court in the *Secretary of the Interior et al.* v. *California et al.* The Court found that Outer Continental Shelf (OCS) lease sales do not "direct-

ly affect" the coastal zone and are not subject to the consistency review under Section 307(c)(1) of the CZMA.

S. 2324 provides that Federal activities directly affecting the coastal zone be fully consistent with approved coastal zone management programs. S. 2324 would apply to any Federal activity whether occurring within, seaward, or landward of the coastal zone and would define an activity directly affecting the coastal zone as one which either (1) produces identifiable physical, biological, social or economic consequences in the coastal zone, or (2) initiates a chain of events likely to result in any of such consequences. The legislation would provide narrow exceptions when the Federal activity is undertaken to counter the immediate effects of a declared national emergency, is necessary for reasons of national security, or is required by other Federal law. A Federal activity which meets any one of these criteria must still be consistent to the maximum extent possible with approved state coastal zone management programs. Thus, the proposed legislation would reverse the Supreme Court's decision excluding OCS lease sales from consistency review, would adopt a broad definition of directly affecting and clarify the geographic reach of the term, and identify those circumstances where agencies are excused from complying fully with that definition.

NOAA opposes the proposed legislation.

NOAA supports a strong state/Federal partnership to manage wisely the resources of the coastal zone and to advance the national interest in the effective management, beneficial use, protection and development of the coastal zone. Both the Coastal Zone Management Act and the Administration's new Federalism initiatives support this objective. And these objectives and the Supreme Court's recent decision are compatible.

State/Federal collaborative efforts are good sense and good government. Such coordination and consultation combined with a strong state role in managing the resources of the coastal zone is a fundamental objective of the Coastal Zone Management Act (CZMA). This objective is clearly established in Section 302(i) of the CZMA which states "the key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone." The Federal consistency provisions of Section 307 further this state/Federal partnership.

As background, I would like to review quickly the current NOAA procedures under which consistency reviews occur. Section 307(c)(1) and (2) apply to direct Federal activities; Section 307(c)(3) applies to Federal permits, licenses and other authorities; and Section 307(d) applies to Federal financial assistance to state and local applicants. The legislation deals only with the provisions of Section 307(c)(1). Under NOAA regulations, implementing Section 307(c)(1), Federal agencies determine which of their activities directly affect the coastal zone of states with approved management programs. If the agency finds such a direct effect, then the agency must provide a consistency determination to the state at the earliest practicable time in the planning of the activity but at least 90 days before final approval of the Federal activity. If the state disagrees with the Federal agency's consistency determination and the disagreement cannot be resolved, the Federal agency may proceed with its activity unless the state obtains a court order prohibiting such action.

The Federal consistency provisions are a critical part of this nation's coastal zone management system. They affect the daily business of many Federal agencies as they act to carry out the mandates of numerous Federal laws some of which were passed prior to the CZMA and others which came later, but all of which must be administered in a compatible manner. The Federal consistency provisions also affect many other interests: large and small businesses and industries, individuals and public groups, towns and communities. Adding to the complexity of the system are the different administrative procedures of each of the 28 coastal states with approved coastal zone management programs.

Changes to such a complex and important system should be based on a full and thorough understanding of the system, its problems and successes. Changes must not be made hastily or in a piecemeal fashion.

NOAA supports the Court's conclusion that OCS lease sales are not subject to the Federal consistency provisions of Section 307(c)(1) based on the relation of the Outer Continental Shelf Lands Act (OCSLA) and the CZMA. As part of the rulemaking NOAA is initiating, which I will discuss in a few minutes, NOAA is consulting other Federal agencies and analyzing the Court's decision as it affects other Federal activities. NOAA has not yet reached a conclusion in this regard.

Although the Supreme Court's decision removed OCS lease sales from review under Section 307(c)(1), NOAA does not believe the ruling creates a pressing need for Congressional action. The CZMA does not exist in a vacuum. Administered to-

gether with other environmental and resource management laws, there are ample opportunities for constructive and meaningful state/Federal collaboration. The states do have an effective and constructive role in the development of OCS resources. In this regard, NOAA applauds the efforts of Secretary of the Interior Clark to build meaningful consultative steps regarding ultimate state consistency concerns into the early stages of the OCS leasing process through the review and consultation procedures provided by Section 19 of the Outer Continental Shelf Lands Act and by the National Environmental Policy act (NEPA). These administrative efforts and the flexibility they allow can best resolve resource use conflicts. Another good example of the conflict resolution mechanisms which work well have been the memoranda of understanding developed between the Department of the Interior and various states which have allowed OCS lease sales to proceed. These coordination and consultation provisions can accomplish the goals of assuring that state concerns are addressed early in the OCS development process.

Also regarding OCS lease sales, one must remember that the states exercise clear consistency review responsibilities over the Federal licenses and permits necessary for activities described in detail in the Plans of Exploration (POE) and the Development and Production Plans (DPP) required by the OCSLA. The Supreme Court opinion expressly recognizes the state's jurisdiction at this stage of OCS development. The Section 307(c)(3) review process works well. For example, as of March 1984, the California Coastal Commission had reviewed 98 POE's and 7 DPP's Concurrences were given to 89 of the 98 POE's and 6 of the 7 DPP's.

A legislative definition of directly affecting is not needed. Federal consistency has worked and is expected to continue to work well in the majority of instances. The present situation in which each Federal agency determines, on a case-by-case basis, whether a proposed activity directly affects the coastal zone has generally worked without controversy, except in OCS lease sale cases. Even in cases where controversy has arisen or, after consultation and negotiations have ameliorated the concerns of parties through pre-lease application of binding stipulations or mitigation measures.

A review conducted by NOAA's Office of Ocean and Coastal Resource Management (OCRM) of Federal consistency actions during 1982 indicated that the states reviewed approximately 300 direct Federal activities under Section 307(c)(1) with non-concurrences in about 3 percent of the cases. Approximately 7500 Federally licensed and permitted activities were reviewed under Section 307(c)(3)(A) and the states objected in about 2 percent of the cases. Approximately 500 Federally licensed activities described in detail in OCS plans under Section 307(c)(3)(B) were reviewed by the states with nonconcurrences in about 0.5 percent of the cases. Finally, the states reviewed approximately 600 Federal assistance proposals to state and local governments under Section 307(d) and objected in about 0.5 percent of the cases. I want to caution you that these numbers are approximate and can only be used in describing the general magnitude of the ratio of concurrences to non-concurrences. Precise data was unavailable in a few cases. Also, differences in state administrative procedures result in figures which are not entirely comparable.

The litigation history of the consistency provisions provides further evidence that the Federal consistency system works. NOAA's research indicates that in the twelve years since the passage of the CZMA only 23 lawsuits have been brought against Federal agencies on consistency grounds. Of these 9 of the cases involved OCS leasing, 2 of the cases involved other activities seaward of the states' coastal zone, 5 of the cases involved activities on Federal enclaves within the coastal zone, and 7 of the cases involved activities, including permits located within the coastal zone.

Because the system for the review of Federal activities under section 307 has, in large part, operated well, NOAA is proceeding cautiously in responding to the Supreme Court's decision. NOAA has submitted to the Office of Management and Budget for informal clearance an Advanced Notice of Proposed Rulemaking (ANPR). NOAA has consulted all concerned Federal agencies about the scope of the proposed rulemaking and the ANPR. The ANPR states that references in existing NOAA regulations which identify OCS lease sales as activities directly affecting the coastal zone and covered by Section 307(c)(1) will be removed from the regulations. These modifications respond to the Supreme Court's clear ruling. Beyond these narrow changes, the ANPR does not propose any modifications, at this time, which would expand the impact of the Court's decision beyond OCS lease sales. Rather the ANPR solicits the views of all interested parties on how activities, other than OCS lease sales, are affected by the Court's decision; on the need for a further regulatory definition of directly affecting; and on other Federal consistency regulations which may require modifications. The ANPR also requests suggestions on how the NOAA

regulations could better encourage state/Federal collaboration at the early, formative stages of Federal activities in the coastal zone.

NOAA anticipates publishing the ANPR in early May. NOAA will provide a public comment period sufficient to assure full reveiw and comment. In addition, NOAA will conduct meetings in at least four regions of the country to gather public comment and to provide information. The ANPR does not commit NOAA to any particular rulemaking other than to remove references to OCS lease sales. The rulemaking will provide an opportunity to gather important information for administrative or statutory action.

In a further effort to gather information both for any rulemaking, NOAA is considering supporting a comprehensive state/Federal study of the experience gained to date in applying the Federal consistency provisions. Such a study could identify and document both problem areas and examples of successful implementation of the consistency review requirements, and form the basis for reasoned revisions to the CZMA and/or the implementing regulations. Although the CZMA became law in 1972, most of the state programs were not approved by the Department of Commerce until the late 1970's and early 1980's. A study would be particularly useful at this stage because 19 states and territories have at least four years' experience in implementing Federal consistency reviews. This is an adequate number of states to provide a range of experience and data from which helpful conclusions may be drawn.

The information gathered in the rulemaking and the study can be used to consider fully the relation of the CZMA to other Federal legislation and whether particular mechanisms to coordinate the consistency provisions of the CZMA with other statutes are needed. For instance, questions have been raised recently concerning the impact of consistency review on fishery management plans.

In summary, because the current Federal consistency system generally works well, NOAA opposes the proposed legislation.

The Chairman. Thank you.

Mr. Bettenberg.

Mr. BETTENBERG. Mr. Chairman, it is a pleasure also to be here. I might note that I think I am familiar with some of the concerns that you and Mr. Gorton might have with activities involving the coastal zone, having been raised in the State of Washington and vacationed on the Oregon coast and the Washington coast as I was growing up, and as frequently as I have been able to, in fact, over the past 20 years since I have been working for the Federal Government in Washington, D.C.

What I would like to do today is simply comment on the things that are in my written testimony, and see if I can lay down a common base of knowledge on some things that relate to many obscure points of law, and yet are very real to us in the Minerals Management Service. I have seen in several editorials that with the Supreme Court decision, the Minerals Management Service, and the Interior Department need not consider the environmental concerns of the day, and nothing could be farther from the case.

What I have provided in my testimony is a review of the steps that we go through in the OCS leasing program. We start with the development of a 5-year program. The development of a 5-year program takes 2 years. It involves several major steps for review of information from the States. We do environmental impact statements on that 5-year program. It comes to Congress, where further opportunity for review takes place.

Once we have the 5-year program and it is approved and we are ready to begin having some lease sales, again, we go through a 2-year process. At the time, we start a sale with a call for information. The sale takes approximately 2 years in the lower 48, a couple of months longer in Alaska. Again, we go through the environmental impact statement process. While we do that, we solicit the

views of the States at the call for Information stage. We take those things into account in scoping and in developing the environmental impact statement. We do the environmental impact statement.

We have comment periods after that with the final impact statement. We come out with a proposed notice of sale, and send a letter to the Governor. In some areas of the country, we send that same letter to a lot of Governors, because the sale potentially affects all of their interests. We are required by law to give Governors a 60-day comment period at that point.

We are required also by law to accept their recommendations unless we find that there are some overriding national interests at stake. We listen very closely to those recommendations, and we lean over backwards to accept them, and I can point to several recent sales where we have specific examples of that. We satisfied all the concerns of the Governor of Texas, for instance, with regard to the Western Gulf sale. We have taken extraordinary measures to make the Diaper sale and the Navari Basin on sales compatible with the recommendations of the Governor of Alaska.

In my testimony, I have included some examples in attachment 2 which illustrate that it is thoroughly difficult at that point in the process to make a real determination of consistency. The reason for that is that at the time we hold a sale, we have to develop what we refer to as a hypothetical scenario. We do not know if gas or oil is going to be discovered in an area. We do not know if it is discovered where it is going to be discovered, and we do not know with precision how it might be developed.

So, for instance, when we have attempted to do consistency reviews, what we have done is hypothesize where oil might be discovered, and how it might be developed. We have to contrast this in a consistency review with what I would refer to as vague plans. The coastal zone management plans of most States, and I have not reviewed all of them by far, but those that I have reviewed include a variety of policy statements which say good things, lay down good goals, and yet give the State very broad discretion in interpreting them.

If you would like for the record today I can give you examples of some situations where some States have concluded that a sale is not consistent, and yet have at the CZMA section 307(c)(3) consistency stage of an exploration plan approved the exploration plans as being consistent in that very same area.

The point that I make here is that at the sale stage we are exchanging paper, the company's money for our lease form. The companies are going to have to go through several further stages at which they are going to have to be consistent, but at those points there are real activities that have been designed and specified and planned.

What I have laid out with the third and fourth steps are the exploration plan stage and the development plan stage. At the exploration plan and development plan stage, the companies are required to submit a consistency determination. They do that through the Minerals Management Service.

We forward that to the State and at the same time we undertake our own review of the exploration plan and the development plan. We are authorized at that time to either grant it, grant it with

modifications, or deny it. If we deny it, we have procedures where we could reimburse the company for certain expenditures they might have made if it is appropriate. The State at that time has to conclude that that plan is consistent with their State CZM program. Otherwise, the activity cannot go forward. So in a practical sense they exercise a veto at that point over the activity.

What we find when we explore the results of that process is that most plans, in fact, are found to be consistent, and as I pointed out, in some cases even in situations where the State at the OCS lease sale stage has been saying that the activity might not be consistent.

I have included an attachment 1 to my testimony that shows the number of approvals that have been granted, which is 1,284 on the Outer Continental Shelf, the number where there was a partial or conditional approval by the States, which is 47, and the number where it was denied, which is 5.

I would submit that those statistics show that the process is fundamentally working. I would also urge you to consider the argument that the OCS exploration and development stage is the most appropriate place to determine consistency so far as the OCS lease process is concerned.

In my testimony also I have tried to lay out some of the additional measures that we have been undertaking since Secretary Clark became Secretary and since I became Director of the Minerals Management Service, which was around Christmastime, to assure, that we take into account all through the leasing process States' coastal zone management concerns.

If you were to look at our most recent call for information for Norton Sound (Alaska), which came out about a month ago, for instance, you would find in it that we have asked for very specific information in that call for information on the State of Alaska's coastal zone management program and any potential conflicts that might arise.

We have introduced additional scoping meetings in conjunction with those environmental impact statements. We have taken the position that we are willing to make many more judgments at the area identification stage, which occurs in the 4th month and sets the stage for an environmental impact statement as the Minerals Management Service's proposal for action. That is, we will reduce acreage that we think is in conflict, as we weigh the national interests so far as potential for oil and gas versus other values is concerned.

We have indicated that we will be including in the section 19 letter which we are required to provide that we will be addressing those coastal zone management concerns in our letter to the Governor. In fact, our practice has been and will continue to be to weigh all considerations that the Governor raises, not just those that are specifically mentioned in section 19 of the OCS Lands Act.

One additional measure that we are exploring at this point is the possibility of entering into negotiations with coastal States over specific terms and conditions that might govern the issuance of exploration permits and development permits. You see, you cannot tell at this point whether an exploration plan or development plan will be consistent based simply on a review of the State's coastal

zone management document, but we think that it may well be possible, if not for all tracts, for some tracts, and if not for all activities, for some activities, to sit down with the States and spell out precisely what they will find to be consistent later on and what they will not.

So, I think that this is an additional step that we can take, and it might be helpful in that regard.

The CHAIRMAN. I am going to have to ask you to conclude.

Mr. BETTENBERG. That covers the main body of my testimony.

[The statement follows:]

STATEMENT OF WILLIAM D. BETTENBERG, DIRECTOR, MINERALS MANAGEMENT SERVICE, U.S. DEPARTMENT OF THE INTERIOR

Good morning Mr. Chairman and members of the Committee. I am pleased to be here to present the views of the Department of the Interior on S. 2324, a bill to amend the Federal consistency provisions of the Coastal Zone Management Act (CZMA). We appreciate the opportunity to testify since the bill would have profound effects on the many programs of our Department. It would affect the programs of the U.S. Fish and Wildlife Service, the National Park Service, and the Bureau of Land Management. The concerns of these agencies will be outlined in detail in the Department's report on this legislation. As I am sure you are aware, the bill would also change the way many other Federal Agency activities are conducted. Yet, despite its scope, we believe the legislation is largely directed at the Outer Continental Shelf (OCS) oil and gas leasing program administered by the Department's Minerals Management Service and therefore my comments will focus primarily, but not exclusively, on the effects on that program.

We strongly believe that S. 2324 would be bad legislation. The bill, if enacted, would create several severe problems:

1. it would set coastal State interests above national interests;
2. it would cause conflicts rather than resolve them; and
3. it would impose undue administrative and litigative burdens and undermine the purposes of the CZMA.

In light of these problems and the concerns of the coastal States, we have reviewed and analyzed the detailed requirements set forth in sections 18 and 19 of the OCS Lands Act Amendments of 1978 (OCSLAA) and section 307(c)(3) of the CZMA. We believe these provisions in combination with current action by the Secretary of the Interior and the Secretary of Commerce to resolve Federal consistency issues are the appropriate measures to assure the proper balance in the resolution of coastal conflicts.

I would first like to explain why the existing statutory provisions are fully appropriate and adequate to resolve coastal conflicts, then explain two initiatives Secretary Clark is taking, and conclude by outlining our objections to the specific provisions of S. 2324.

The OCSLAA established a phased decisionmaking process for the leasing and development of OCS oil and gas resources. The procedures for implementation of this process have been reviewed at several levels of the judicial system and have been fully upheld.

The first step in the phased process is the development of a 5-year leasing program. Section 18 of the OCSLAA, which mandates the preparation of this program, requires development of procedures for "consideration of the coastal zone management program being developed or administered by an affected coastal State. . . ."

This section also obligates the Secretary to "select the timing and location of leasing, to the maximum extent practicable, so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone." While the Secretary must strike a proper balance concerning the potential for coastal impacts, the Department has always maintained that the determination of consistency would be premature at this point. This continues to be the case, even though the adoption of a 5-year schedule could be regarded by some as "setting in motion" subsequent leasing, exploration, and development and production activities.

The second step in the phased decisionmaking process is prelease planning which culminates in a lease sale. The bill's sponsors urge that consistency be applied at this stage. However, since 1979 the Department of the Interior has emphasized the uncertain and hypothetical nature of information at the prelease stage and has

maintained, given the uncertainty of this information, that it is impossible at this step to make conclusive consistency determinations about all subsequent OCS operations that at some point affect the coastal zone.

The third step in the phased decisionmaking process is the approval of exploration plans. The Congress carefully reviewed the overall OCS administrative process and added section 307(c)(3)(B) to the CZMA in 1976. This section provides for certification of consistency for exploration plans, as this is the earliest stage in the overall process where a sufficient amount of specific information is available for a conclusive consistency test. The Conference Committee report on this provision states that section 307(c)(3)(B) ". . . specifically applies the consistency requirement to the basic steps of the OCS leasing process—namely, the exploration, development and production plans submitted to the Secretary of the Interior. This provision will satisfy State needs for complete information on a timely basis, about details of the oil industry's offshore plans."

The fourth step of the process is the approval of development and production plans. Again, section 307(c)(3)(B) of the CZMA provides for State concurrence in a certification of consistency before any Federal permits may be granted.

It is essential to recognize that throughout these steps no OCS oil and gas operations capable of affecting a coastal area may be approved unless they: (a) are found to be consistent by the State, (b) are conclusively presumed to be consistent because the State has not dissented within 6 months of submission of an OCS plan; or (c) are found by the Secretary of Commerce to meet a test related to objectives and purposes of the CZMA and/or national security objectives.

To date, more than a thousand OCS oil and gas exploration and development and production plans have been submitted to States pursuant to section 307(c)(3) of the CZMA (See Attachment 1). As you will note, relatively few conflicts remain unresolved at the completion of the section 307(c)(3) process. We would urge this Subcommittee to fully review not just the history of conflicts under section 307(c)(1), but the history of approvals, accommodations, and denials under section 307(c)(3). The OCSLAA and section 307(c)(3) of the CZMA in combination provide an effective process for consultation among interested parties, for resolving conflicting interests, for protecting coastal resources, and for developing OCS oil and gas resources.

It is clear that these procedures have not eliminated all controversy. That may be an inherently impossible goal. Nevertheless, we are committed to doing all we can to identify and employ innovative measures which would further reduce controversy whenever possible. I would like to outline the actions initiated recently by Secretary Clark to help resolve some of the CZM concerns raised by coastal States regarding the OCS program after the January 1984 Supreme Court opinion on Federal consistency. We believe these actions will promote the kind of constructive coordination and cooperation needed to fulfill the purposes of the CZMA.

It is important to note that the following steps are new procedures and augment those described above.

1. The Department of the Interior is working with State authorities to address States' concerns to help assure that future OCS operations can be conducted harmoniously with State CZM programs. We are seeking to identify those concerns early and analyze them as part of the decision process on each sale. Specifically, we will:

(a) request comments at the Call for Information stage on issues related to possible CZMA section 307(c)(3) conflicts and consider these comments in the Area Identification stage;

(b) make provisions in the environmental impact statement (EIS) scoping process for identification of CZM issues. Each EIS will include an evaluation of possible CZMA section 307(c)(3) conflicts;

(c) analyze possible CZM conflicts in the Department's Secretarial Issue Document (SID) for the proposed Notice of Sale. The analysis will be based on the final EIS (which would incorporate State and local comments on the draft EIS) and consultations with the State;

(d) explain to the Governor how State CZM program policies have been considered in decisionmaking and invite any further comment the State wishes to make. By letter, we ask the Governor for comments on the size, timing, and location of the sale. A copy of letter will be sent to the State CZM contact;

(e) incorporate any State CZM Agency comments and proposed measures for dealing with CZM concerns into the decision document on the final Notice of Sale; and

(f) explain how State CZM concerns were handled in making decisions on the final Notice of Sale. This will be part of the balancing letter required in response to the Governor's comments on the size, timing, or location of the proposed sale.

2. The Department of the Interior is also initiating negotiations with affected coastal States early in each sale planning process to develop lease terms and condi-

tions designed to address the State's concerns about consistency of OCS operations with its federally approved State CZM program. The result of these negotiations, if and to the degree they are successful, would be an agreement by the Department to adopt the negotiated lease terms and conditions, provided that the State guarantees that exploration plans submitted on blocks leased in the sale complying with the negotiated lease terms and conditions will receive consistency concurrence under section 307(c)(3) of the CZMA with no further conditions. To the degree feasible, a similar agreement would be made for development and production plans. Information about these agreements would be published in the Notice of Sale so that potential bidders could consider this in formulating their bids.

Our aim in these negotiations is to resolve as many issues as possible for as many tracts as possible prior to issuance of the final Notice of Sale. It is as yet unclear how successful these negotiations will be. However, we believe that incentives exist for both the Department and the State to reach agreement. This approach should also be acceptable to potential lessees. Let me explain the incentives.

We believe coastal States should be receptive to such a negotiation since it can save them staff time in reviewing individual plans and making consistency findings. States need only negotiate once with the Interior Department, rather than individually with many lessees at various times. For many tracts, but not necessarily all, the States would be able to prescribe during the prelease process those terms and conditions they believed to be necessary to ensure the consistency of subsequent operations. If the Department and a State cannot reach agreement on the terms and conditions for a particular set of tracts, the State can opt instead to wait and evaluate consistency of activities in individual plans under section 307(c)(3) when they are submitted.

The Department of the Interior also has the incentive to negotiate. The Department would not be obliged to ensure that the subsequent, largely hypothetical, 20 to 30 years of OCS exploration, development, and production activities are fully consistent, as envisioned by S. 2324. Rather, the negotiations offer an opportunity to focus the prelease consistency discussion on the criteria for State consistency concurrence with future operational plans. These discussions will be especially pertinent to the exploratory phase of the process, which is the first point when actual coastal effects may occur. By helping to establish more certainty in the subsequent approval processes, these negotiations would contribute to meeting primary goals of the OCSLA and the CZMA.

The industry should prefer this approach too, since potential lessees could adjust their bids to accommodate the cost of specific lease terms and conditions. Bidders would know in more detail which tracts presented uncertainty and which did not with respect to their obligations under section 307(c)(3) of the CZMA.

In addition to the above new procedures, I would like to express our full support for the two initiatives of the Commerce Department as outlined by Administrator Byrne: (1) the Federal consistency study and (2) rulemaking on section 307(c)(1).

The study will draw on the professional expertise available in the State and Federal governments as well as from the private sector and the public. This comprehensive and collaborative effort should lead to creative solutions which would promote State-Federal coordination and cooperation on coastal issues. Since 1972 when the CZMA was enacted, such an effort to work out solutions to the diverse issues surrounding Federal consistency has never been undertaken. We believe that what is needed now is not a more powerful legal lock hold, but a dedication on the part of everyone with an interest in coastal management to develop the necessary incentives for coastal States and Federal Agencies to work together cooperatively.

In the interim, NOAA rulemaking can go a long way to resolving some of the issues surrounding section 307(c)(1). The rulemaking process will first determine and then implement appropriate changes to comply with the Supreme Court's findings. We believe the Committee should await the outcome of NOAA rulemaking and the Federal consistency study and should give the negotiations we are initiating with the coastal States a chance to succeed. In our view, legislative action on Federal consistency preempting these efforts would be counterproductive.

I would now like to turn to the specific provisions of S. 2324. For several reasons, we find the bill to be a bad idea. In setting up the OCSLAA phased decisionmaking process which I summarized a few moments ago.

Congress wisely provided separate check points at each stage of the process and the provisions for placing additional conditions on or even terminating further activity. Except for some minor timing differences, the section 307(c)(3) consistency process fits well with the OCSLAA procedures. However, this bill would effectively deny the existence of both the CZMA section 307(c)(3) and the OCSLAA processes.

Given our experience in the consistency controversy and litigation over the last 5 years, we can only approach this bill by anticipating the ways in which some State CZM Agencies would interpret it. My observations on the ill effects of this bill are based on the sorts of interpretations we would expect some coastal States to make. We clearly recognize that not all coastal States would make interpretations such as those we present. However, in court these are the interpretations which would likely be encountered if a Federal activity become locally controversial.

If enacted, it would force the Department to ensure that uncertain and hypothetical scenarios projecting 20–30 years of OCS operations would be "fully consistent" with State CZM program requirements. However, even if the Department could accurately predict the future course of operations and their effects on the coastal zone, the standards of State CZM programs are simply not specific enough to ensure accord on what constitutes full consistency either today or 20–30 years hence.

Attachment 2 to this testimony provides three examples which demonstrates the impracticability of making meaningful consistency determinations at the prelease stage. In reviewing these examples, it is important to keep in mind that S. 2324 would require an even more rigorous and inflexible test of consistency for Federal Agencies undertaking leasing and planning activities.

In addition to the above objections, the Department of the Interior strongly opposes enactment of S. 2324 for the following reasons. It may be useful to refer to S. 2324 as I discuss them.

S. 2324 Would Raise Coastal State Interests Above Federal Interests Regardless of the Cost to the National Interest, or the Taxpayer.

S. 2324 would go far beyond the CZMA as enacted in 1972 in transfering authority from Federal to State CZM Agencies. The CZMA section 307(c)(1) term "directly" is clearly intended to limit the types of effects on the coastal zone to those which the test of consistency is to be applied. Until now, the debate has been over the definition of that limit. S. 2324 would end that debate by defining the term "directly" to remove all limits to the effects which are required to be consistent with State CZM programs. The bill starts that an activity "directly affects the coastal zone" if it either:

"Produces identifiable physical, biological, social, or economic consequnces in the coastal zone" or

"Initiates a chain of events likely to result in any such consequences."

It is difficult to think of a single Federal activity which would not meet one or both of these criteria.

Similarly, in adding section 307(c)(1)(A), S. 2324 would require full consistency, without any realistic limitation for all Federal agency activities.

At first glance, this may not seem apparent since the bill indicates that a Federal Agency is not required to be fully consistent with approved State management programs if the Federal activity is:

(i) undertaken to counter the immediate effects of a declared national emergency;

(ii) necessary for reasons of national security; or

(iii) required by any provision of a Federal law which prevents consistency with any provision of an approved State coastal zone management program.

However, S. 2324 indicates that a Federal activity which meets any of these three criteria must be "consistent, to the maximum extent possible," with approved State coastal zone management programs. Since the term "consistent of the maximum extent possible" appears to be essentially equivalent to "fully consistent," the exceptions to full consistency are likely to be found to be illusory. For instance, it may not be prudent to ensure that an activity is consistent in a national emergency or if it is necessary to the national security, but it generally would be "possible", and thus a requirement of S. 2324, to do so.

Even if criteria (i) and (ii) prove to provide some limitation in full consistency, they would provide no relief whatsoever for any of the diverse national interest programs of the Department of the Interior. Moreover, Federal laws rarely if ever are written in a way which prevents consistency with a State CZM program. Thus, criteria (iii) would rarely if ever provide a limitation on full consistency.

The net effect of S. 2324 would be to require that most, if not all, Federal Agency activities be fully consistent with State CZM programs even if completely unrelated to the natural resources of the coastal zone or if the Federal environmental standards are more stringent than the State's standards. The bill would subject Federal programs with important national objectives to the preferences of individual coastal States whenever those programs had any effect on the coastal zone no matter how indirect or inconsequential.

A requirement for full consistency with State CZM programs would upset the congressionally mandated balancing required of the Secretary of the Interior in devel-

oping a 5-Year OCS Oil and Gas Leasing program and in determining the size, timing, and location of leasing. Full use of State CZM authority granted by this bill could result in the loss to the Nation of billions of dollars of revenue from OCS oil and gas leases over the next few years alone. It is quite clear that the careful balancing of national and State interests required by the OCSLAA and CZMA could not be achieved if the bill were enacted.

State CZM agency's social and economic policies could prevent the acquisition of land outside the coastal zone for national interest purposes, be they development or preservation. In every case, the Federal activity would have to be fully consistent with State CZM policies despite the implication for any balancing test built into the Federal Agencies' statutory authorities.

The bill would also require that numerous Federal resource management regulations, which apply nationwide, be fully consistent simultaneously with each and every approved State CZM program. Moreover, the bill requires that most Federal regulations be fully consistent since most regulations would initiate a chain of events likely to result in at least one of the "consequences" specified in the bill.

We trust the Congress recognizes the broad nature of the legal changes which S. 2324 would effect. This bill goes far beyond reversing the recent Supreme Court opinion.

S. 2324 Would Not Help Resolve Important State/Federal Coastal Zone Management Issues Which Have Long Festered For Lack of Creative, Practical Solutions, But Instead Would Invite Additional Conflict by Imposing Indiscriminate, Impracticable, and Rigid Legal Burdens on Federal Agencies.

One of the reasons the Department of the Interior argued against a determination of consistency for OCS prelease activities was that such a determination is a prescription for a most curious paper exercise and for inevitable conflict. I encourage each Subcommittee member to read the consistency determinations we produced for each lease sale in an attempt to comply with the Ninth Circuit's ruling on OCS Sale 53 and judge for yourself whether these or any determinations based on such hypothetical scenarios, are a productive use of Federal Agency and State CZM agency resources and result in any significant additional protection of coastal zone resources. We would be pleased to submit some examples.

S. 2324 would not only require such determinations for OCS oil and gas lease sales, but also for the 5-year OCS oil and gas program and a myriad of other early stage activities of Federal Agencies such as rulemaking and general and intermediate range planning of the Bureau of Land Management, National Park Service, General Services Administration, Army Corps of Engineers, Department of the Navy, Soil Conservation Service, Forest Service, etc. The net result would be a rapid increase in litigation and little benefit to the balanced management of coastal resources envisioned by the CZMA.

The "chain of events" test in S. 2324 is intended to codify a formulation of "directly affecting" espoused by a number of coastal States but recently rejected by the Supreme Court. The problem with this test is that it would require Federal Agencies such as those listed above to make consistency determinations prematurely, at early planning stages, before it could be said with any certainty that a proposed action would, in fact, be undertaken. The consequences would be (1) the unnecessary and wasteful burden of having to prepare a consistency determination for the initial step of proposals that often never come to fruition, (2) the impossible task of having to prepare a consistency determination at a stage when the direct environmental effects of a proposed action are yet unknown because the details of the proposal are not established, and (3) the development of a product that, because of the hypothetical generalities in which it would necessarily have to be written, is likely to be meaningless.

S. 2324 Would Provide Substantial Obstacles to Achievement of the Policies of the CZMA and Cannot be Implemented in a Manner Consistent With Those Policies.

Give that the bill would reach essentially every Federal agency activity, State and Federal decisionmakers would be inundated with consistency determinations. Thus, the CZMA's goal of "coordination and simplification of procedures in order to ensure expedited governmental decisionmaking for the management of coastal resoures" would be thwarted. Likewise, the legal lock hold over Federal Agency actions envisioned by S. 2324 makes no provision whatsoever for the CZMA goal of "the giving of adequate consideration to the views of affected Federal Agencies."

The CZMA goal of "improved predictability in governmental decisionmaking" would be drastically eroded since the bill would require Federal Agency actions to be reshaped according to any of a wide variety of interpretations of the general and imprecise State CZM program policies. If Federal Agencies were to make interpretations of State CZM policies, as was the case prior to the Supreme Court's opinion,

then disagreement with the State would likely continue to be frequent and strong. If, on the other hand, the intent of this bill is to terminate Federal Agency activities which may lead to the remote possibility of some future risk of environmental damage or social or economic change, the Federal agency would not be able to carry out its national interest responsibilities. Both are unacceptable outcomes.

I would like to make one final point. The Committee should recognize that some State CZM agencies assert that consistency with their programs means, in effect, that they can control Federal activities. That is, some State CZM agencies assert that if an activity outside the coastal zone has any effect whatsoever on the coastal zone, then every aspect of the activity must be conducted in precisely the same manner in which the State CZM officials, through their broad discretion, would decide to require it to be conducted if the activity took place within the coastal zone.

On the other hand, the Department of the Interior believes that it is only the physical and perhaps biological effects of the activity itself which actually reach or occur in the coastal zone that the Federal Agency must determine to be consistent, not with the State CZM agency's preferences, but with the provisions of the State's CZM program as approved by the Secretary of Commerce.

We believe this is a debate that has yet to receive full public scrutiny, and we hope that the Subcommittee would consider the implications of this issue for all Federal agency activities in light of the proposed requirements for full consistency embodied in this bill.

As I have indicated, the proposed legislation would set State interests above national interests, cause conflicts rather than resolve them, and impose inordinate administrative and litigative burdens on Federal Agencies. From the standpoint of the OCS program, it would require impracticable and inappropriate consistency tests at the leasing stage when current laws and procedures are adequate and more properly timed to resolve coastal issues.

Secretary Clark is determined to seek accommodation with the coastal States and directed us to commence consultation and negotiation with them soon after he became Secretary. This can be done best under the procedures and initiatives he has announced. Further legislation is simply not needed. Furthermore, Mr. Chairman, this proposal is not in the national interest and we urge Congress to reject it.

That ends my testimony, Mr. Chairman. I would be pleased to answer any questions.

ATTACHMENT 1

STATE ACTIONS ON COASTAL ZONE MANAGEMENT ACT SECTION 307(c)(3) CONSISTENCY CERTIFICATIONS OF OCS OIL AND GAS EXPLORATION AND DEVELOPMENT AND PRODUCTION PLANS SINCE 1978

	Number approved without conditions	Number of conditional or partial approvals	Numbers denied	Total certifications submitted
Atlantic	[2] 215	15	0	230
Gulf of Mexico	1,006	0	0	1,006
Pacific	59	[3] 18+	[4] 5	82+
Alaska	4	14	0	18
Total	1,284	47+	5	1,336+

[1] Pursuant to 15 CFR 930.79, a State must either concur or object to the consistency certification submitted with a plan.
[2] Approximately 20 percent of the plans are conclusively presumed by the Minerals Management Service to be consistent with State CZM programs because of lack of State response within the consistency timeframe mandated by the Coastal Zone Management Act.
[3] California has partially denied activities involving 18 exploration plans and in addition, State review of many other OCS plans have resulted in negotiation of plan changes between the applicant and the State, such an additional 500 feet of oil spill containment boom, a right to request oil spill containment drill exercises, etc.
[4] OCS Plans Denied Federal Coastal Zone Management Act section 307(c)(3) Consistency Concurrence by the State:
State, plan, type, and under appeal to Commerce:
California, Chevron P-0205, exploration, no.
California, Exxon Santa Ynez Option A, development, yes.
California, Union P-0203, exploration, yes.
California, Sun P-0231, exploration, no.
California, Exxon P-0467, exploration, yes.

ATTACHMENT 2

EXAMPLES OF THE DIFFICULTY OF MAKING MEANINGFUL CONSISTENCY DETERMINATIONS AT THE PRELEASE STAGE IN THE OCS OIL AND GAS DEVELOPMENT PROCESS

SALE 82 (NORTH ATLANTIC)

The coastal zone off most of Massachusetts is included in State-designated ocean sancturies. The sanctuary regulations prohibit the building of any structure on the seabed or under the subsoil of the State's territorial waters within a designated sanctuary. The applicability of the Ocean Sanctuaries Act to pipelines is unclear as the act was originally passed to prohibit sewage outfalls. The hypothetical OCS oil and gas transportation scenario in the EIS on Sale 82, North Atlantic, included a pipeline with a landfall in Massachusetts. Massachusetts' comments on the draft EIS for Sale 82 indicated that it believes an OCS pipeline would fall under the Ocean Sanctuaries Act prohibition.

There is nothing in the sale itself that would require a pipeline to be built. Instead, a proposal for a pipeline would only be made if a quantity of hydrocarbons, sufficient to warrant building a pipeline, is discovered. However, that quantity may not be discovered in the North Atlantic OCS Planning Area. Further, should a pipeline actually be proposed, there is nothing in the sale proposal that would require it to come ashore through a Massachusetts ocean sanctuary. Finally, an application for a pipeline with a landfall in Massachusetts would have to comply with the Ocean Sanctuaries Act in order to obtain consistency concurrence under 307(c)(3) of the CZMA.

Without a specific proposal to consider, a ruling on the applicability of the Ocean Sanctuary Act to an OCS pipeline can not be made. Therefore, prior to an actual proposal for a pipeline in Massachusetts, consistency with this element of the CZM program cannot be conclusively demonstrated or disproven.

SALE 79 (EASTERN GULF OF MEXICO)

The Florida CZM program includes a statute providing for a review and permitting procedure for developments of regional impact, with special procedures for such developments in Areas of Critical State Concern. Charlotte Harbor is such an area. Under the State program, special regulations are to be formulated to permit developments of regional impact there. The EIS for Sale 79 hypothesized onshore support facilities at Charlotte Harbor for OCS activities. As with Sale 82, there is nothing in Sale 79 that would require Charlotte Harbor to be used for onshore support. Further, the special regulations required by the State plan, which had not yet been developed at the time the Sale 79 EIS was written, will apply to any development in Charlotte Harbor, regardless of whether it is related to OCS activities.

In the absence of specific regulations and of a specific proposal for use of Charlotte Harbor for OCS-related activities, there was no basis at the prelease stage for concluding that there might be future conflicts between this State CZM policy and future OCS activities. Florida, however, stated that the consistency analysis did not provide adequate assurance that State resources in Charlotte Harbor would be protected. In fact, Florida extended the argument about consistency with this statute to the Florida Keys, another Area of Critical State Concern, where no onshore facilities were hypothesized in the EIS. This State argument ignores both the lack of information at the prelease stage and the amount of control available to the State for onshore development.

SALE 73 (CENTRAL CALIFORNIA)

The broad resource and use policies of the California Coastal Act were combined to support a California Coastal Commission position that a commitment to transportation of crude oil by pipeline rather than tankers was required to ensure consistency for Sale 73, offshore Central California. Evidence that the Commission recognizes the need to remain flexible on the question of transportation modes, however, is found in the recent approval of a plan of development and production in the promising Point Arguello field where tanker transport has been approved while the pipeline question continues to be studied.

Thus, the Department is faced with apparently contradictory statements of policy by the State. With such contradictions, it is most difficult, if not impossible, to address State CZM policies in a conclusive manner.

[The following information was subsequently received for the record:]

QUESTIONS OF SENATOR INOUYE AND THE ANSWERS THERETO

Question 1. In the testimony presented at the hearing on S. 2324, the Department of Interior said it was working with affected coastal States early in the lease sale planning process to try to develop lease terms and conditions suited to the State's needs and concerns. If the State and Department cannot agree on such terms, however, the Department says the State can wait and evaluate consistency under section 307(c)(3) of the CZMA (since section 307(c)(1) is no longer applicable to OCS leasing activities). However, this would mean waiting until the lease sale was a *fait accompli* and the chain of events leading to activities directly affecting the State's coastal zone was already triggered. Furthermore, the Supreme Court's decision on OCS leasing determined that CZMA's section 307(c)(3) does not require a consistency review.

In light of this, what route does a State have without section 307(c)(1) or 307(c)(3)--to influence Federal decisions on lease sales? I know that the Department has been very forthcoming and cooperative with Hawaii thus far in their joint venture, but what legal assurances does the State have that its concerns will be addressed by the Department unless the consistency provision is restored for OCS leasing?

Answer. We first should point out an apparent misunderstanding with regard to the Supreme Court's decision. The Court did *not* determine "that CZMA's section 307(c)(3) does not require a consistency review," as suggested in your question. In fact, the Department does not contest the existence of State CZM review over OCS exploration and development/production activities. Indeed, the States' broad authority over those activities under section 307(c)(3) is one of the principal reasons why the Department believes that consistency review is unwarranted at the pre-leasing stage, when so many questions are unanswered as to the existence and extent of oil and gas resources. The Department's concern, shared by other Federal agencies, is that S. 2324 may be construed to give a single coastal State the ability to halt or delay important projects. This problem is compounded by the vague, ambiguous policies listed in many State CZM programs. Our concern, we should emphasize, is *not* with a State's rights to participate; we have never questioned the State's right in that regard.

In fact, the States have numerous opportunities to influence decisions on lease sales. The sale process is progressive, with the first level of decision being the selection and timing of areas for inclusion in the 5-year lease sale program. Section 18(f)(5) of the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLA) requires the "consideration of the coastal zone management program being developed or administered by an affected coastal State pursuant to section 305 or 306 of the Coastal Zone Management Act of 1972 (16 USC 1454, 1455)." After consultation with the States in establishing the sale scheduled, further consultation is undertaken for each lease sale pursuant to section 19 of the OCSLA. The Secretary of the Interior is required to ". . . accept recommendations of the Governor and may accept recommendations of the executive of any affected local government if he determines, after having provided opportunity for consultation, that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." In addition, States participate actively in commenting on proposed lease sales and alternatives discussed in environmental impact statements prepared under the National Environmental Policy Act (42 USC 4321). We are attaching a statement describing steps in the offshore leasing process to provide more detailed information on the conduct of the required consultation process. Consultation under the OCSLA provides every opportunity for States to influence decisions on lease sales which would be available under 307(c)(1), except that a single State cannot arbitrarily veto a matter of national energy policy concern. Under the OCSLA, the Secretary is required to balance environmental and energy policy concerns and to consider both national interests and the Governors' recommendations concerning the well-being of citizens of the affected States prior to giving his approval to the terms and configuration of a lease sale. You should also be aware that the award of an OCS lease, as the Supreme Court noted, grants limited rights to a lessee. No activity on the OCS is permitted until the Department has approved a plan of exploration or development/production and the State CZM agency concurs in the consistency of the permitted activities as required by section 307(c)(3).

Question 2. The public hearings in Hawaii on the Environmental Impact Statement (EIS) for the deep seabed mining venture are scheduled for the end of April. It

is very important to Hawaii that the State has an equal voice at the crucial EIS stage of the project to assure that the project's later stages stay within predictable guidelines consistent with the needs and concerns of the State. It is especially important that the EIS cover all aspects of the planned mining venture including surveying, leasing, mining, processing and finally disposal of the toxic waste products (any dumping of this extract in Hawaiian waters should be preceded by an extensive joint study of the potential impacts).

Can the Department assure the State that it will have a voice in the making of these plans, and that any EIS will be comprehensive in its coverage of all the aforementioned areas?

Answer. The environmental impact statement for the possible mining of cobalt-rich manganese crusts in the EEZ surrounding the Hawaiin Archipelago is being prepared as a *joint* effort by a working group composed of Federal and State of Hawaii representatives and advisors. All involved Federal and State agencies will assure that all known impacts and other potential impacts can be satisfactorily addressed.

The State of Hawaii is being funded by the Department of the Interior to have the EIS prepared jointly with Hawaiian contracts in order to assure that potential impacts will be addressed.

Question 3. It is my understanding that much of the Department's work during the initial stages of this project will be contracted out to private firms.

Does the Department have plans to see that the majority, if not all, of this contracting work is done locally in Hawaii? This is where the impact of the project willk be and it seems appropriate that the brunt of the EIS and surveying work be done locally.

Answer. All work on the EIS is being contracted by the Department of the Interior through the State of Hawaii. The University of Hawaii will adminster the subcontracting of work in order to assure that all professional support needed will be provided by local Hawaiian sources.

Only when the State of Hawaii and the Department of the Interior deem that such services are not available will subcontracting be awarded to other professionals.

Question 4. Apparently, most of the seamounts around Hawaii that are believed to contain cobalt-rich manganese crusts are outside the archipelagic waters of the State of Hawaii claims.

Nonetheless, can the Department assure that any leasing that may be done within the archipelago is done only after an equitable and acceptable Federal-State arrangement is worked out with regard to jurisdiction of, and compensation for these tracts?

Answer. The United States is not entitled to claim and has not asserted "archipelagic" jurisdiction around the islands of Hawaii under customary international law, since Hawaii is not a nation-state. The Federal Government has also not elected to draw straight baselines off of Hawaii. As a result, Hawaii's submerged lands under the Submerged Lands Act would be determined in accordance with the 1958 Convention on the Territorial Sea and Contiguous Zone and would follow the sinuosities of the coast, except in the case of recognized exceptions.

Every effort will be made to resolve any Federal/State dispute over the delimitation of such lands in accordance with these generally applicable principles.

The Secretary has final leasing authority with respect to Federal submerged lands; and at this time, it is unclear whether tracts in disputed areas will be offered. In any event, any income derived from disputed tracts would be placed in escrow pending final resolution.

Question 5. In conclusion, the deep seabed mining industry is one that is just emerging and will require careful and comprehensive planning to succeed. I would urge the Department to use the dependable resources of Hawaii's Department of Planning and Economic Development in addressing this new field of opportunity. I believe that only a Federal-State joint effort, undertaken with balanced objectives and far reaching goals will yield optimal results. Decisions should not be rushed and valid concerns should not be ignored for the sake of political expediency.

Does the Department share my views?

Answer. Yes, we are working with Hawaii's Department of Planning and Economic Development in addressing this opportunity. We are also working with them and the State of Hawaii to reach the long term goals of this endeavor. The timing, planning, and scheduling of this activity will be a joint decision made by the Minerals Management Service and Hawaii's Department of Planning and Economic Development.

Attachments.

HAWAII AND U.S. DEPARTMENT OF INTERIOR ANNOUNCE JOINT FEDERAL-STATE TASK FORCE TO EVALUATE COBALT-RICH MANGANESE CRUSTS

Governor George R. Ariyoshi of Hawaii and Secretary of the Interior William Clark today announced the formation of a Joint Federal-State Task Force to consider the economic potential and environmental impacts of ocean mining for the recovery of cobalt-rich manganese crusts in the 200-mile Exclusive Economic Zone (EEZ) surrounding the Hawaiian Archipelago.

"We are pleased," said Secretary Clark, "to have Hawaii join us in this cooperative effort and look forward to establishing this procedure with other states on similar projects."

"It is a great step forward," said Governor Ariyoshi, "to have the State and Federal authorities working so closely together to assess these ocean resources within the Hawaiian Archipelago for the benefit of all the people of Hawaii and our nation."

The Task Force will evaluate opportunities created by the Presidential Proclamation of March 10, 1983, which established the U.S. EEZ, and will also consider ways of implementing the Interior Department's responsibilities for authorizing the exploration and development of mineral resources within the EEZ and the Outer Continental Shelf Lands Act of 1953.

These actions are consonant with President Reagan's 1984 State of he Union message in which he stated, "The Department of the Interior will encourage careful, selective exploration and production of our vital resources in an exclusive economic zone within 200-mile limit off our coasts but with strict adherence to environmental laws and with fuller state and public participation.

Governor Ariyoshi declared in his 1984 State of the State message, "We want to develop technology that is suited to *these* islands and *these* times and *this* Pacific Ocean . . . subject areas such as OTEC, biotechnology, ocean mining, ocean robotics and research . . ."

The goal of the Task Force is to establish a close working relationship between State and Federal authorities which would permit the potential leasing, exploration, and development activities to be carried out under terms which meet the environmental requirements and economic aspirations of both the State of Hawaii and the Federal Government.

The manganese crusts are from one to seven centimeters thick, are found on seamounts of depths of 800 to 2,400 meters, and may contain in excess of one percent cobalt. In comparison, onshore deposits usually are found with only one-quarter of one percent of cobalt. In addition to cobalt, the crusts contain potentially economic deposits of nickel and manganese. These metals are widely used in specialty steel alloys. For example, cobalt gives steel greatly enhanced resistance to high temperatures and pressures, and is used for jet aircraft engines. The U.S. is almost totally dependent on foreign sources for these critical minerals.

The initial assignments of the Task Force are to delineate the primary areas of interest for exploration and to define those environmental concerns which must be taken into consideration in a draft Environmental Impact Statement.

Co-chairmen of the Joint Federal-State Task Force are Dr. Michael J. Cruickshank, mining engineer with the Interior Department's Minerals Management Service, and Dr. John C. Wiltshire, manager of the Ocean Resources Office, Hawaii Department of Planning and Economic Development. The chairmen were chosen to lead this critical environmental and economic evaluation because their extensive experience in ocean mining, marine geology, and environmental research.

STEPS IN OFFSHORE LEASING

	Month	
	Lower 48	Alaska
Identify area of hydrocarbon potential		
Call for information: [1] publish notice of intent to prepare an EIS [1]	1	1
Area identification	4	4
Draft environmental impact statement [1]	12	15
Public comment period [1]	14	17
Final environmental impact statement	18	21
Proposed notice of sale	19	22
Governors Comments [1]	21	24
Final notice of sale	22	25

STEPS IN OFFSHORE LEASING—Continued

	Month	
	Lower 48	Alaska
Sale	23	26
Bid review	24	27
Lease issued	25	28

[1] State consultation opportunity

IDENTIFY AREA OF HYDROCARBON POTENTIAL

At least 2 months before the Call for Information is published, the Assistant Secretary for Land and Minerals Management (ASLM), approves the area of hydrocarbon potential (AGP) for the upcoming sale. This is the area considered by MMS to have potential for the discovery of oil and gas.

CALL FOR INFORMATION; PUBLISH NOTICE OF INTENT TO PREPARE AN EIS

The Call, signed by the ASLM and published in the *Federal Register* at month 1, invites potential bidders to indicate areas and levels of interest in leasing and solicits comments from States and all interested parties on any environmental effects and use conflicts as well as coastal zone consistency concerns. States and others have the opportunity to comment on areas or topics of concern that should be considered in planning the lease sale. The Call also shows the AGP. Comments are due 45 days after the Call is published.

A Notice of Intent to prepare an Environmental Impact Statement (EIS) is also published. It announces the initiation of EIS scoping and invites public assistance in determining the significant issues, including coastal zone consistency issues, and alternatives to be analyzed in the EIS.

AREA IDENTIFICATION

About 4 months after the Call is published, the comments and industry's expressions of interest are analyzed. The ASLM approves the area to be analyzed in an EIS as the proposed Federal action. Areas are deleted at this stage from further study where significant multiple use conflicts exist and the potential for hydrocarbon discovery is low. Areas may also be deleted because of conflicts with military uses of the areas.

DRAFT ENVIRONMENTAL IMPACT STATEMENT

About a year after the Call is published, a draft EIS is issued which describes the entire planning area and focuses on the potential environmental effects of oil and gas activities in the area proposed for leasing. The EIS includes evaluation of possible Coastal Zone Management Act (CZMA) section 307(c)(3) conflicts. The document also analyzes alternatives to the proposed action. The availability of the draft EIS is announced in the *Federal Register*.

PUBLIC COMMENT PERIOD

A 60-day comment period follows public availability of the draft EIS, during which time public hearings will be held in the affected region. Comments received either orally or in writing are considered in preparation of the final EIS.

FINAL ENVIRONMENTAL IMPACT STATEMENT; PROPOSED NOTICE OF SALE

The final EIS is prepared which assesses and considers comments received during the draft EIS public comment period. These include further State and local comments on coastal zone consistency matters. A Secretarial Issue Document (SID) is prepared to analyze all issues involved in the proposed sale, again including possible coastal zone consistency conflicts that could be expected at the exploration and development stages. The proposed Notice, signed by ASLM and generally planned to be published the month following tne filing of the final EIS with EPA, contains the proposed terms and conditions of the sale. Blocks proposed for leasing, stipulations, and other mitigating measures are listed, along with proposed bidding systems. As required by section 19 of the OCS Lands Act, the proposed Notice is sent to Gover-

nors of affected States for comments on size, timing, or location of the sale. This letter will also explain how State coastal zone management program policies have been considered in decisionmaking and invite any further comment the State wishes to make. A copy of this letter is sent to the States' official contact in the coastal zone management agency. If the proposed sale contains blocks that are within 3 miles of the Federal/State boundary, an offer of an agreement to equitably distribute revenues from these blocks under section 8(g) of the OCS Lands Act is also made to the affected States.

GOVERNORS COMMENTS

The Governors of affected States have 60 days in which to comment on size, timing, or location of the sale. These comments are used to develop recommendations to the Secretary regarding the final Notice.

FINAL NOTICE OF SALE

After receiving comments from the Governors, a final decision memorandum which analyzes all issues is prepared for the Secretary. The Secretary is to accept the recommendations of a Governor if he determines that they provide for a reasonable balance between the national interest and the wellbeing of the affected State. The rationale for this determination is to be communicated to the Governor in writing. About 90 days after the proposed Notice is published and after consideration of comments from the Governors, the Secretary issues a final Notice of Sale, if he decides to proceed. The date, timing, location, blocks to be offered, terms, and conditions of the sale are published in the *Federal Register* 30 days before the sale is conducted.

SALE

At least 30 days after the final Notice, a sale is conducted by the appropriate regional office. A public opening and reading of sealed bids submitted by qualified bidders occurs.

BID REVIEW

High bid for each block are evaluated after the sale to assure receipt of fair market value. The Justice Department also reviews the results to insure that awarding leases does not create a situation inconsistent with antitrust laws.

LEASES ISSUED

The Secretary has up to 90 days after receipt of bids to either accept or reject a bid. Bid acceptance has been delegated to the Regional Managers; normally bids are accepted and leases issued within 1-2 months after the sale.

QUESTIONS OF SENATOR HEFLIN AND THE ANSWERS THERETO

Question 1. Is it not true that under existing laws and regulations coastal States already have a strong voice in OCS oil and gas leasing matters?

Answer. It is true that coastal States have a strong voice in OCS oil and gas leasing matters.

Existing statutory provisions, including the OCS Lands Act Amendments of 1978 (OCSLAA) and section 307(c)(3) of the Coastal Zone Management Act (CZMA), are fully appropriate and adequate to assure that coastal States' concerns are properly considered and reflected in all OCS planning and decisionmaking.

The OCSLAA established a phased decisionmaking process for the leasing and development of OCS oil and gas resources. The procedures for implementing this process have been reviewed at several levels of the judicial system and have been fully upheld.

The first step in the phased process is development of the 5-year leasing program. In developing the 5-year leasing program, the Secretary is required by law to seek the views and comments of the Governors of coastal States three times and to respond in writing or explain to the President and Congress why these views were or were not adopted at various points in the process. The current 5-year program was upheld in all respects by the U.S. Court of Appeals for the D.C. Circuit, which rejected a broad range of legal challenges.

The second step in the phased decision making process is planning for each individual lease sale. States have four opportunities to make their views known during the presale planning process: 1) in response to the Call for Information; 2) in preparation of the National Environmental Policy Act (NEPA) document during the scoping process and by commenting on draft documents in writing and in public hearings; 3) and in response to a request for preliminary consultation on issues related to the size, timing, and location of the proposed sales; and 4) in response to the proposed Notice of Sale. The fourth opportunity to comment is guaranteed under section 19 of the OCSLAA, which requires the Secretary to accept a Governor's recommendations on the size, timing, or location of a lease sale if, after opportunity for consultation, he determines that they provide for a reasonable balance between the national interest and the well-being of citizens of the affected State.

Information on the precise nature and location of activities that may result from the sale is hypothetical at this point. It is, therefore, impossible at this stage to make a definitive determination of the consistency of all possible future activities with State CZM programs.

The third step in the phased decision making process is the approval of exploration plans. Exploration plans and accompanying environmental reports must be provided to each affected State. If the State has an approved CZM program, the exploration plan must receive a consistency concurrence from the State, pursuant to section 307(c)(3) of the CZMA. This is the earliest stage in the overall process where a sufficient amount of specific information is available for a conclusive consistency test. The Conference Committee report on this provision states that section 307(c)(3)(B) ". . . specifically applies the consistency requirement to the basic steps of the OCS leasing process—namely, the exploration, development and production plans submitted to the Secretary of the Interior. This provision will satisfy State needs for complete information on a timely basis, about details of the oil industry's offshore plans."

The fourth step of the process is the approval of development and production plans. It is not unitl after this stage that the most significant oil and gas activities in terms of potential environmental effects take place. Earlier exploration activities have little potential for environmental effects and are short-lived. Development and production activities are also the most difficult to predict at the lease sale stage. Again, section 307(c)(3) of the CZMA provides for State concurrence in a certification of consistency before any Federal permits may be granted. Additionally, under section 19 of the OCSLAA, Governors of all affected States may submit comments on the size, timing, or location of proposed oil and gas development plans. The Secretary once again is required to accept those comments if he finds that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected States.

It is essential to recognize that throughout these steps no OCS oil and gas operations capable of affecting a coastal area may be approved unless they: (a) are found to be consistent by the State, (b) are conclusively presumed to be consistent because the State has not dissented within 6 months of submission of an OCS plan; or (c) are found by the Secretary of Commerce to meet a test related to objectives and purposes of the CZMA and/or national security objectives.

Question 2. What if a potentially affected coastal State does not concur that a lessee's Plan of Exploration or Plan of Development and Production is consistent with the State's CZM program? Does this mean that the lessee cannot proceed with any work on the lease?

Answer. If a potentially affected coastal State objects to a lessee's consistency certification for a Plan of Exploration or a Plan of Development and Production, Federal Agencies, including the Minerals Management Service (MMS), cannot grant the permits which the lessee must have before it proceeds with any of the activities described in detail in the plan.

If a State objects to the consistency certification submitted with a Plan of Exploration or a Plan of Development and Production, the lessee can ask the Secretary of Commerce for a finding that each activity described in detail in the plan is consistent with the objectives of CZMA, or is otherwise necessary in the interest of national security.

If the Secretary of Commerce does not make such a finding and the Plan of exploration or Plan of Development and Production cannot be modified in a manner which results in the State granting its concurrence to the lessee's consistency certification, the lessee would be effectively barred from proceeding with work under the lease.

If a State fails to concur with or objects to the certification submitted with a plan and it does not proivde a written statement within 3 months describing the status of

its review and the basis for further delay in issuing its final decision, the concurrence of the State with the certification is conclusively presumed.

Question 3. Why is the oil industry opposed to legislation to amend the CZM Act to include OCS lease sales in the CZM consistency process?

Answer. The oil industry has testified before the Congress on numerous occasions. While we hesitate to characterize their concerns and urge reference to such testimony, we believe industry basically shares the concerns often expressed by the Department of the Interior about a consistency requirement for leasing. In essence, a consistency test for leasing is neither necessary or a productive exercise, given that Congress established section 307(c)(3). This section requires certification of consistency prior to approval of exploration and development and production plan. Federal consistency review of lease sales pursuant to section 307(c)(1) would; be based on information which is not sufficiently developed to allow a meaningful assessment of subsequent activities. The appropriate time for a consistency test is prior to approval of specific activities which would actually result in any possible direct effects on the coastal zone.

Question 4. If the CZM Act is amended as proposed, would it be possible for a State, or even a particular organization within a State that opposes OCS leasing in general, to attempt to actually stop entire sales for no sound reasons?

Answer. Yes. This answer is affirmative for two reasons. First, the section 307(c)(1) amending provision to the CZM Act does not contain an appeal provision for review and override by the Secretary of Commerce as does the current CZM Act section 307(c)(3). Thus, there is no real protection against arbitrary and unreasonable State actions. Federal agencies subject to the proposed amendment to section 307(c)(1) must be fully consistent with approved State CZM programs. The Federal regulations adopted by the Department of Commerce to implement section 307(c)(1) of the current CZM Act defined the consistency requirement of "to the maximum extent practicable" as "fully consistent." This was so restrictive that it virtually removed the discretion apparently intended by Congress when this term was first adopted. The United States Court of Appeals for the Ninth Circuit specifically found that the standard of compliance established by these regulations, when applied to the context of OCS leasing, "weighs too lightly the interests of the Nation against that of a state." The court further indicated "that the federal government is intended to have the ultimate authority over the OCS lease program." The Supreme Court was not required to review this aspect of the Ninth Circuit opinion. By requiring full consistency of section 307(c)(1) as the legislation proposes, the Department believes that the State's interests would be raised above that of the nation, often at great and unnecessary expense to the taxpayer.

Second, some States have acted with little regard for section 307(e)(1) and (2) of the CZM Act, which provides that the consistency review was not intended to diminish Federal "jurisdiction, responsibility, or rights" or to supersede, modify, or repeal "existing laws applicable to the various Federal agencies." These States have found actions inconsistent with their programs based on issues of Federal jurisdiction. For example, potential navigation conflicts have been the basis of unfavorable action even after the U.S. Coast Guard found that no excessive navigation hazards would result from leasing actions. Similarly, potential adverse effects on endangered species have been cited when the Fish and Wildlife Service found no jeopardy to such species.

Question 5. Would not amending the CZM Act as proposed virtually give the States and even organizations within the State veto power over OCS lease sales, which would be contrary to the national interest?

Answer. The answer is again yes, and for essentially the reasons noted in answering question No. 4. The States are required to consider national interests in developing their CZM programs, but the programs often contain such vague policies that it is impossible at the program approval stage to foresee the extent to which national interests will actually be accommodated in specific consistency reviews. In the absence of clear Federal standards to either allow a Secretary of Commerce review or to preserve the administrative discretion of individual Federal agencies, there is no assurance that such interests will be considered relative to individual lease sale proposals. In fact, since State officials lack a constituency for issues of national interest, it is not realistic to expect the States to act in the capacity of balancing State and national interests. We believe section 307(c)(3) provides the appropriate administrative procedure through specific provision for Federal review of national interests pursuant to the overall objectives of the CZM Act and the requirements of national security. Section 307(c)(3) also applies to post-leasing activities at a stage where potential effects are better defined and the relative weight of State and national concerns may be more effectively evaluated.

Question 6. Would not Secretary Clark's recently announced adjustment of the OCS leasing program even strengthen an already strong state role in OCS matters? Is not this an additional reason why the CZM Act does not need to be amended?

Answer. Yes. In his January 12, 1984, remarks to the Outer Continental Shelf (OCS) Policy Committee, Secretary Clark outlined his objectives regarding OCS leasing. Among these objectives are increased State and public participation, early resolution of issues, and communication with States and affected parties prior to the beginning of the sale process and continuously thereafter.

Early and ongoing consultation with the States in prelease planning as well as in the process for approval of exploration and development and production plans should do much to ensure that State views are fully considered throughout the OCS process. These adjustments are now being implemented.

The CHAIRMAN. Let me ask you this, and either you or Dr. Byrne can answer it. What is the process that the various Federal agencies go through when they review a proposed State coastal zone management plan? Whichever of you is better versed on that may answer.

Mr. BYRNE. We have with us, Mr. Chairman, Peter Tweedt, who is the Director of the Office of Ocean and Coastal Resource Management, which is the Office that handles coastal zone management plans within NOAA. If you would like a detailed answer, I would ask Peter to come forward.

The CHAIRMAN. Yes; I would like a detailed answer. Could you give me your last name again, sir?

Mr. TWEEDT. I am Peter Tweedt.

The CHAIRMAN. Tweedt. Thank you.

Mr. TWEEDT. We review each coastal zone management plan. There are currently plans for 28 States and territories that are approved and in place. Federal agencies have an opportunity to comment on each aspect of the plan as it is going through the approval stage before we make a determination. We work with the State in tailoring a need that we may see that they do not see. We work together to provide a plan.

As an example, the State of Virginia is currently in the process of seeking approval.

The CHAIRMAN. When you say "we," you check it with lots of Federal agencies, I assume.

Mr. TWEEDT. Yes, Senator, but the people who are doing the direct work with the State agency are the people from NOAA, from the Office of Coastal Zone Management.

As I started to mention, in the State of Virginia, they are seeking approval of their plan, and this has been a process that started several years ago. Then they lost interest for a time, but have now come back in with renewed interest. Through that entire process, people from NOAA have been working with the State of Virginia in suggesting things that they might do with their laws that would qualify their program for Federal approval.

The CHAIRMAN. In adopting these plans, you are supposed to review it from a standpoint of what is or is not good for the national interest, are you not?

Mr. TWEEDT. Yes.

The CHAIRMAN. I am sure you get comments from time to time from different agencies saying, we do not think this is in our interest, or translate that national interest, and that is a factor you take into consideration.

Mr. TWEEDT. Yes.

The CHAIRMAN. And no State can adopt a plan without the approval of the Federal Government.

Mr. TWEEDT. That is correct.

The CHAIRMAN. So presumably before a plan is ever adopted, the Federal Government has watched out for what it regards as legitimate national interests.

Mr. TWEEDT. For the plan, yes. That is correct.

The CHAIRMAN. The plan.

Mr. TWEEDT. The plan.

The CHAIRMAN. So the plan is to be in harmony. The State says, we want A, B, and C, and the Federal Government says, you can do A and B but not C, because we think C is not in the national interest.

Mr. TWEEDT. The plans, Senator, are very broad plans. Many of them are not down to a point that, for example, you will harvest so many tons of fish a month or something like that.

The CHAIRMAN. I understand that.

Mr. TWEEDT. They are not specific.

The CHAIRMAN. I understand that, but finally the Federal Government and the State government agree on the plan.

Mr. TWEEDT. Yes.

The CHAIRMAN. At that stage, at least it was our presumption that activities, whether they are Federal or otherwise, should then be harmonious with the plan, consistent with the plan. Now, at that stage an activity takes place, and the State says, this is not consistent. The Federal Government may say it is consistent, or it is not consistent, or it is an activity that does not affect the coastal zone so consistency does not matter. That is the kind of controversy you can get. Is that not correct?

Mr. TWEEDT. Yes.

The CHAIRMAN. At that stage you can go to court. That is what happened in California. You finaliy went to court. If before a plan is ever adopted the State and Federal interests are supposed to be harmonized, what is wrong, then, with requiring that subsequent Federal actions be the actions of the Federal Government alone or actions by some private party acting at the sufferance of the Federal Government be consistent with the State plan?

Mr. TWEEDT. You can do that in a general way, but as I mentioned earlier, to try to write a plan that would cover every conceivable event and have it specifically laid out in a plan, and determine whether that would be consistent before the event even took place, I think, would be difficult to do. I think you can do it in broad guidelines, as in the case of OCS.

There are two sections of the law that are still in effect and would apply in any plan. Before any OCS lessee would be able to do anything with his lease, explore it or develop it, the company would have to have that lease plan approved by the appropriate State as being consistent with that State's plan.

The CHAIRMAN. Wait a minute. You were saying under the Outer Continental Shelf law?

Mr. TWEEDT. No; I am talking about the coastal zone management law.

The CHAIRMAN. Oh, I thought you were talking about OCS.

Mr. TWEEDT. What I am getting at, for it to go beyond the lease stage, once a company has purchased a lease to then do anything with that lease, explore it or subsequently develop it, they would twice have to go before their respective State to——

The CHAIRMAN. That is if it is an oil or gas lease.

Mr. TWEEDT. Yes

The CHAIRMAN. What if it is not oil or gas?

Mr. TWEEDT. There are some activities that do not have permits. Fishery management plan activities do not require permits, although vessels may.

The CHAIRMAN. Or any Federal activity under the Supreme Court's decision.

Mr. TWEEDT. I am not going to try to interpret or second guess the Court. I think there is one section, as I recall, one point in their rather long decision that can allow one to determine that it is a broad or narrow ruling, and I think that is one of the things that we can well determine as we go through the rulemaking that Dr. Byrne has already discussed.

The CHAIRMAN. Let me ask you this, and cut me off when my time is up, will you, please, so that I do not intrude on Senator Gorton's time. What other law exists that would give the State a right to stop an action they thought inconsistent with their coastal zone management plan or at least go to court and make their argument? What other law exists other than the Coastal Zone Management Act that gives the State the right to stop it, assuming they prove their case in court?

Mr. TWEEDT. I am sure that the NEPA laws would be able to stop various actions.

The CHAIRMAN. But there it is not limited to a State under the Environmental Protection Act.

Mr. TWEEDT. It would certainly employ NEPA to stop an action.

The CHAIRMAN. I grant you that, but that is a much broader implication than the State's coastal zone management plan. I am talking about if the State has a plan approved by the Government, and you do not have the enforcement powers that we thought a State had prior to this Supreme Court decision. Where else do they go to enforce their management plan? Now, you are answering, they can go to NEPA if it violates the Environmental Protection Act, and I understand that, but that is tangential to the Coastal Zone Management Act.

Mr. TWEEDT. But I am also saying that the Coastal Zone Management Act can stop activities. I mentioned oil exploration, oil development within the provisions of the Coastal Zone Management Act, and in fact the Supreme Court ruling mentions that that aspect of the Coastal Zone Management Act is still in place.

The CHAIRMAN. Where can they go if they want to stop the lease?

Mr. TWEEDT. They certainly have a great opportunity to affect the leasing stage with the OCS Lands Act under section 19.

The CHAIRMAN. Yes, but how do they stop it?

Mr. TWEEDT. I think, if that were genuinely a State's interest to stop OCS leasing, that those interests would have to be also in the national interest. I am sure that, in that case, that would be recog-

nized by the Department of the Interior, and indeed the lease would be stopped under section 19 of the OCS Lands Act.

The CHAIRMAN. Let us get to that. I want to make sure. You are saying that the State would have a right to stop it under the OCS Act.

Mr. TWEEDT. No, sir, I said—I should probably let the lawyers for Interior comment on their act. I am giving you my opinion.

The CHAIRMAN. All right. I am happy to have Mr. Bettenberg comment if he wants. I do not see anything in the OCS Act. I understand the conciliation. I understand the mediation. I understand the Secretary of the Interior in his dealings with Governors and States, but I don't see any threshold in there that the State can point to, that is a firm threshold that can say this is the standard, the Federal Government is going beyond that standard, and we are going to sue to try to stop them. What I see are lots and lots of concilations and mediations.

Mr. TWEEDT. Senator, I think you also have to weigh the national interest of a State stopping an OCS lease sale that affects the other 49 States. As an example——

The CHAIRMAN. Hopefully——

Mr. TWEEDT. Let me give you an example of the Nation's proven OCS reserves. About 77 percent of the oil and 96 percent of the gas is in the Gulf of Mexico; 68 percent of the total gulf leasing is off the Louisiana coast. Now, if Louisiana decided to stop OCS sales, that would have a profound effect on all 50 States, not just one State. So I think there has to be a national-interest balance that has to be weighed in this. I think that would be well done in section 19 of the OCS Lands Act.

The CHAIRMAN. Hopefully that had been done when we adopted the Coastal Zone Management Act.

Mr. BETTENBERG. Mr. Chairman, if I could respond to your series of questions, I think you are absolutely correct that there is not a point in the OCS Lands Act where the Governor per se can stop the action. I would not quarrel with your interpretation of that.

The Secretary in that act is charged with weighing environmental concerns, with weighing State concerns, and also with expediting oil and gas development. There are provisions written in there that he has to examine the national interest and accept the Governor's recommendations unless he finds a national interest override. That is spelled out in detail in section 19.

But to get to your earlier question about the plan having been found to be in the national interests, that is a difficult test to make at the point, given the broadness of the plans. Let me read you one policy from the State of New York.

Policy number 29 from the State of New York says, "Encourage the development of energy resources on the Outer Continental Shelf, in Lake Erie and other water bodies, and ensure the environmental safety of such activities."

There is half of one paragraph that further addresses this in their explanation of the policy, but the policy is what is examined when a determination is made as to whether we are consistent or not. That paragraph talks about a variety of things that must be considered, but provides nothing definitive against which we can really measure an OCS sale lease or even for that matter an explo-

ration or development plan without exercising broad judgment. I think what we are typically doing in these cases is exercising broad judgment.

I have with me similar statements from the California plan, similar statements from the Massachusetts plan as statements of principle. These are, I think, very good plans, but they do not provide the sort of detailed guidance that you are indicating or that you might be implying in being able to determine precisely what the national interest is.

Let me give you an example of how this has worked. In the last North Atlantic sale, four States agreed the sale was consistent with the programs. Two disagreed. In both cases where States disagreed, they in fact have permitted exploratory activities in the same area from a previous sale held during a previous administration.

However, if you simply relied on the test at the sale stage, when people are speculating, sometimes wildly, about what might happen, you might well get States to say, hey, this is going to be inconsistent, and yet when they look at the specific plans, they find instead that they can accommodate this activity.

In the Mid-Atlantic area, six States found the last Mid-Atlantic sale, sale 76, to be consistent with their coastal zone management plan, and only three did not. Yet with the legislation that has been proposed here, we would be setting up a situation where any single state could veto an CCS lease sale. I think that is not the proper way we should determine the national interest in a case like this.

The CHAIRMAN. Mr. Bettenberg, I have no more questions.

Alan, good to have you with us this morning. Senator Cranston from California, I think, has an interest in this also.

STATEMENT OF HON. ALAN CRANSTON, U.S. SENATOR FROM CALIFORNIA

Senator CRANSTON. Thank you very much. I do not have any questions. I do have a brief statement I would like to make for the record.

The CHAIRMAN. Go right ahead.

Senator CRANSTON. First, Mr. Chairman, I want to thank you for introducing S. 2324, which I am happy to cosponsor with you. The legislation is needed to clarify the consistency provision of the Coastal Zone Managment Act, and I applaud you for introducing it. I am very pleased you are holding this hearing so soon after the bill's introduction, thus bringing the issues involved before the committee so promptly.

This legislation, as you well know, would implement the basic principle of States rights. In this case, California in particular has the right to an appropriate role in Federal decisions affecting the States. It is ironic that the need for this legislation upholding States' rights arises because of adverse actions taken by the conservative administration of President Reagan, supported by the adverse decision of a conservative Supreme Court.

The Reagan administration once talked loudly and proudly about the New Federalism. But the Reagan vision in 1980 of the new federalism, like the Reagan vision of the balanced budget, has crumbled into the dust in 1984.

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S. 2324 is necessitated by the recent Supreme Court decision arising out of the Interior Department's plans to lease portions of the California coast for oil and gas development. Because the Interior Department refused to involve the State of California in preleasing and leasing decisions of OCS Lease Sale 53, California sued. The case ultimately went to the United States Supreme Court.

In ruling against the State of California, the Supreme Court—in my view—completely misinterpreted congressional intent with respect to the consistency provision, section 307(c)(1) of the Coastal Zone Management Act. Although the lawsuit arose over OCS lease activities, the Court's decision is not limited to OCS leasing. It has far-reaching implications for all Federal activities that may impact coastal zones, including ocean disposal of nuclear submarines and deep seabed mining.

It is imperative that the consistency review provision of the Coastal Zone Management Act be restored as provided for in S. 2324. The legislation does not grant States new authority over Federal activities directly affecting coastal zones. It does not give States a veto over Federal activities like OCS development, nor does it give States any jurisdiction over Federal actions which occur outside the coastal zone and which do not affect the coastal zone.

Rather, S. 2324 undoes the wrong done by the United States Supreme Court and restores the carefully balanced Federal-State partnership established by the Coastal Zone Management Act in section 307(c)(1).

Mr. Chairman, I have a more extensive statement that I would like to submit for the record. I urge the committee's favorable action, and I will be happy to work with you to expedite early floor consideration.

[The statement follows.]

STATEMENT OF HON. ALAN CRANSTON, U.S. SENATOR FROM CALIFORNIA

Mr. Chairman, as an original cosponsor of S. 2324, I'm pleased to have this opportunity to appear before the Senate Commerce Committee to testify in support of this legislation to amend the Coastal Zone Management Act of 1972 and clarify the consistency provision, section 307(c)(1) of the Act.

As you know, S. 2324 provides that federal activities directly affecting coastal zones—whether within the zone itself or outside—are to be conducted in a manner consistent with states federally approved coastal management plans. This legislation is needed because the U.S. Supreme Court in its recent 5-4 decision in *Secretary of the Interior* v. *California* (1984) misinterpreted—in my view—section 307(c)(1) of the Coastal Zone Management Act.

Passed in 1972, the Coastal Zone Management Act was designed to assure that rapidly increasing demands for industrial, commercial, recreational and conservation needs of our coastal regions would be accommodated in an orderly and farsighted manner. In return for developing federally approved management programs, states were promised through the federal consistency provision, section 307(c)(1), that the federal government would seek to the maximum extent practicable to make its own actions consistent with these state coastal plans. The U.S. Supreme Court's ruling that some federal activities directly affecting a state's coastal zone need not meet the consistency requirement violates Congressional intent and that promise made to the states.

Prior to the U.S. Supreme Court's decision, it was understood that section 307(c)(1) applied to federal activities occurring both seaward and landward of the coastal zone. This understanding was based on the National Oceanic and Atmospheric Administration's regulations which specifically state that federal activities outside the coastal zone—on the Outer Continental Shelf and landward of the coastal zone—are subject to consistency review. To my knowledge, states in conducting consistency re-

views of federal activities both seaward and landward of the coastal zone have not abused this authority. California in particular has been very careful to limit its review of federal activities landward of the coastal zone to those activities which have clear and significant impacts on the coastal zone, such as mineral leasing in the Los Padres National Forest on tracts inside and adjacent the coastal zone.

S. 2324 reasserts that the consistency provision applies to federal activities within, seaward and landward of the coastal zone and that there is no geographic limitation on section 307(c)(1).

Equally important, the Coastal Zone Management Act provides that federal activities directly affecting the coastal zone be consistent to the maximum extent practicable. Prior to the U.S. Supreme Court's ruling, it was understood that this meant fully consistent with state programs unless specifically prohibited by another federal law or precluded by some unforeseen circumstances arising after approval of the coastal plan. The Department of the Interior in 1983 however took the position that Outer Continental Shelf (OCS) pre-leasing and leasing activities were not subject to consistency review because they did not directly affect the coastal zone, that is, physically impact the coastal zone in the absence of other federal actions.

Ironically the legislative history of the Coastal Zone Management Act clearly shows that Congress envisioned OCS pre-leasing and leasing activities be reviewed for consistency with state plans. Excluding states from participating in the initial stages of the process, as the court's decision does, is not supported by the legislative history or by the demands of effective coastal management. It is during the prelease stage that decisions are made on the size and location of tracts, the timing of the sale, and the stipulations to which leases are to be subject. Each of these decisions is crucial to OCS planning decisions. The Coastal Zone Management Act intended that states be involved in this critical stage in OCS decision making.

S. 2324 clarifies the meaning of "directly affects" and the obligation of the federal government to be consistent with states' coastal plans. It spells out that section 307(c)(1) consistency review is necessary for federal activities which initiate a chain of events which will impact coastal management. The legislation also clarifies that federal activities be fully consistent.

Under S. 2324, the only circumstances under which an activity does not have to be fully consistent are those necessitated by a Presidentially declared national emergency, national security, or conflicting federal law. In such circumstances, the federal activity would have to be consistent to the maximum extent possible. I believe the exemption for "national security" needs to be better defined and more closely tied to actual military operations. I therefore would like to suggest that the Committee consider specifying "national defense" in lieu of the vague term "national security". At a minimum, Committee report language is needed.

Although *Secretary of the Interior* v. *California* arose specifically over the application of the consistency provision to OCS lease sale 53, the U.S. Supreme Court's decision is not limited to OCS leasing. It has far reaching implications for all federal activities that may impact coastal zones including ocean dumping and deep seabed mining, making it all the more imperative that the consistency provision as Congress intended be restored. Section 19 of the Outer Continental Shelf Lands Act is not a substitute for section 307(c)(1) as it is limited to OCS leasing and does not address many other federal activities. Moreover, in commenting on an OCS lease sale pursuant to section 19 of OCSLA, a governor does not need to take into consideration a coastal management program.

For all federal activities, section 307(c)(1) provides a mechanism for avoiding litigation and promoting cooperation between affected states and the federal government. Indeed, it is precisely because the Coastal Zone Management Act results in better cooperation and coordination between states and the federal government that it has always enjoyed strong bipartisan support.

I want to make it clear that S. 2324 does not grant states new authority over federal activities directly affecting coastal zones. Rather it restates the rights states have had since the passage of the Coastal Zone Management Act. It reaffirms that under CZMA states have the right and opportunity—at all stages in the decision-making process—to influence federal activities directly affecting their coasts. It does not, however, give states a veto over federal activities like OCS development. The state coastal programs must be approved by the Secretary of Commerce and unless a state program provides for adequate consideration of the nation's energy needs, the Secretary must disapprove the coastal plan. The only recourse available to a state is through the courts. S. 2324 also does not give states any jurisdiction over federal actions which occur outside the coastal zone and which do not affect the coastal zone.

Mr. Chairman, S. 2324 merely undoes the wrong done by the U.S. Supreme Court and restores the carefully balanced federal state partnership established by the Coastal Zone Management Act in section 307(c)(1). I urge the Committee to move forward with this important legislation as expeditiously as possible.

The CHAIRMAN. Alan, I appreciate your cosponsorship, and I might say what the Federal Government wants goes even further than what you said. Any Federal activity in the 200-mile zone, if it is straight Federal, whether it is disposing of nuclear submarines or whatnot, even if it affects the coastal zone, is no longer subject to any kind of State action.

Only if it happens to be private action operating through lease or suffrage under the Federal Government under certain circumstances is subject to the Coastal Zone Act. But if it is a pure Federal activity, it is out, gone.

Senator CRANSTON. I agree. That is why we need this legislation.

The CHAIRMAN. Gentlemen, thank you very much for coming.

Senator CRANSTON. Thank you, Bob.

The CHAIRMAN. Thank you, Alan.

Next we will take a panel from the coastal States, Mr. Richard Delaney, assistant secretary of environmental affairs for Massachusetts, Mr. James Ross, the director of the Land Conservation and Development Commission, from Oregon, and Mr. John Van de Kamp, attorney general of the Department of Justice, State of California.

Gentlemen, good to have you with us this morning. Do you want to start, Mr. Delaney, or how do you want to go? What order?

Mr. DELANEY. I think I will defer to the Attorney General.

The CHAIRMAN. All right. Go ahead, sir.

STATEMENTS OF JOHN K. VAN DE KAMP, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, STATE OF CALIFORNIA; RICHARD DELANEY, ASSISTANT SECRETARY OF ENVIRONMENTAL AFFAIRS FOR MASSACHUSETTS; AND JAMES F. ROSS, DIRECTOR, OREGON LAND CONSERVATION AND DEVELOPMENT COMMISSION

Mr. VAN DE KAMP. Mr. Chairman, I am John Van de Kamp, the attorney general of California. I am pleased that I have seen my senior Senator. I know my junior Senator, Senator Wilson, is also very much in support of this particular measure. He is in support, and I might say he was here. He hopes to get back.

The CHAIRMAN. There was a 9:30 briefing on the elections in El Salvador, a closed briefing for Senators only. He said he was going to that. He hopes to be back before the hearing is over.

Mr. VAN DE KAMP. I am pleased to see that there is some bipartisanship to this, because I think it is very important.

Anecdotally, yesterday I met with the Attorney General, in a session with attorneys general from around the country, and Attorney General Smith in this meeting emphasized something that we think is very important, and that is that there should be a consultative rather than a dominative relationship between the Federal Government and State government, and I might say he has done that. As a Democrat, I can tell you that they have worked at that pretty well.

I met the President the day before with other attorneys general, and at one point in the proceedings he indicated that he was a subversive States' righter. I think what he meant was, he was a States' righter in Federal clothing.

The problem, of course, that we have here today and that we are all dealing with is that despite some very positive steps the new Secretary of the Interior has taken in California, the ghost of James Watt still roams our coastline, a coastline which is a little bit more battered and tattered than what it was 15 years ago. It is still greatly threatened by proposals for massive Federal activities.

What I see going on now, at least on a temporary basis, is some changing of horses in the middle of this administration policywise, and I am not sure how long the good attitudes that I see in Interior right now will continue. I raise the ghost of James Watt because in many ways his is an earthly presence which still threatens us in many ways. It is still seen in Oregon as well as in California.

Frankly, it is because of a fortunately small number of people who come into Federal Government who pay little or no heed to the States that we are here today to try to place into law some kinds of protections that will mutually protect both Federal and State interests.

Senator you put your finger on it very nicely a few minutes ago in emphasizing the point that the Federal Government pushed the States to pass coastal zone management proposals, and indeed that they did. Unfortunately, what we have seen is some lipservice by the Federal Government to the participation of States in this process that was originally intended to bring both together. The result is that we have spent many months, years, in fact, in the courts battling over the meaning of words and trying to get a fair share of the rights which Congress, we believe, gave us to protect the coastal zone.

We lost through the Supreme Court's decision a significant amount of the influence which the States were supposed to have over Federal decisionmaking whether, that decision was right or wrong. There is no sense in crying over spilled milk. We have to deal with it. And that is what you are doing with this very progressive legislation.

What are the threats? Interior people would lead us to believe things are going much better. In some ways the moves have been good since Secretary Clark came in, and yet there are still some threats that hang over us that have not been totally dissipated. The Interior Department, for example, has proposed leasing for oil and gas development on the pristine north coast of California, that is lease sale number 91, which is in its very preliminary stages today.

Interior is issuing a call for information, and that would cover an area from Point Concepcion to the Oregon coast, with major environmental impacts, air quality problems, ground water problems, on-shore problems if leasing followed by drilling occurs. That is still on the drawing boards; you can ask Interior about its plan for this lease sale.

Second, in the past, Interior has proposed leasing of the Channel Islands Marine Sanctuary off of Santa Barbara, lease sale 68. That is now on hold, but there are major impacts there with respect to

the protected rookeries for animals as well as plant life in that area.

Third, Interior has proposed leasing 70,000 square miles, 40 million acres offshore California for massive deep sea strip mining; that is, of course, the Gorda Ridge development which has been delayed for 6 months; it will have very heavy impacts on our coastline. Then there's nuclear submarine dumping proposal, which is one of the wackiest proposals I have heard of yet, which would be excluded from consistency by the Supreme Court decision.

The CHAIRMAN. Any Federal activity would be.

Mr. VAN DE KAMP. That is right. I think you understand it fully. This morning I feel as if I am preaching to the converted; you have a very good handle on the kinds of issues that this raises for State governments; I am appreciative of your own balanced approach to it.

I would like to make a couple of comments about the legislation that are more technically oriented.

First turn to page 2 of S. 2324. You provide, and I think quite rightfully, for some exclusions from consistency. The first one would be where Federal activity is undertaken to counter the immediate effects of a declared national emergency.

I do not quarrel with that exclusion, although I think it should be clear that the national emergency should be one declared only by the President. Here we are speaking of acts of war or major emergencies that affect the United States generally.

Second, you list for exclusion situations where "necessary for reasons of national security." Now, I have some problems with that.

That exception is troublesome for several reasons. There probably should be some kind of national security interest carved out so that there may be an override; but this exception is troublesome as worded because it is so broad a concept; indeed it is a wide umbrella under which it seems that nearly every kind of Federal activity could fall were a Federal decisionmaker like the past Secretary of the Interior to give it a broad and self-serving interpretation.

It should not be used to create a major exception to full consistency; so I hope that as you look at this, Congress would clearly specify that that exception is limited to instances in which the activity is required for necessary military operations in the national interest, and then perhaps establish a bipartisan determination to declare whether or not it falls within the purview of "national security," so that someone who has his own view of national security cannot run amok.

I mention that only because I think this bill is an attempt to try to set brighter lines between Federal and State Government. I do not want to see legislation enacted which does not rectify the situation which brings us here in the first instance.

With respect to the third part of your bill, your third exclusion, I have no problem with that. I think the language is preferable to that of the House bill which I supported in principle yesterday as I testified on the House side.

In conclusion, I think this bill moves in the right direction; I am grateful for the opportunity to be here.

[The statement follows.]

STATEMENT OF JOHN K. VAN DE KAMP, ATTORNEY GENERAL, STATE OF CALIFORNIA

I. INTRODUCTION

In enacting the Coastal Zone Management Act in 1972, Congress sought to encourage the states to develop comprehensive programs to manage, protect and preserve the resources of the coastal zone. In order to encourage the states to develop such programs, Congress made the promise that federal agencies conducting activities impacting the coastal zone would not be allowed to disrupt the comprehensive programs developed by the states and approved by the Department of Commerce. This promise was contained in section 307(c)(1) of the CZMA which now provides:

"Each Federal Agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs."

Over the years since its enactment, several major disputes arose with regard to the meaning and application of section 307(c)(1), in particular with regard to the meaning of the phrase "directly affecting the coastal zone." It was the dispute between California and the Department of the Interior over the meaning of that phrase that led to the opinion of the Supreme Court of January 11, 1984, and which has now led to these hearings on proposals to amend section 307(c)(1).

The opinion of the Surpreme Court has seriously weakened the promise Congress made to the states. The scope of section 307(c)(1) has been severely reduced and there is now uncertainty about the ability of state coastal programs to manage the coastal zone effectively.

Congress must recognize the significance for the coastal states of federal consistency. Only the federal government conducts OCS oil and gas leasing with its potential for major oil spills. Indeed, the California coast has already been subjected to a major spill. Only the federal government proposes to lease millions of acres offshore the northern California coast for massive deepsea strip mining. Only the federal government proposes to dispose of 100 nuclear submarines offshore California with the risk of radioactive wastes entering the food chain. These activities will have major impacts on the ability of California to manage and protect its coastal zone, but with the opinion of the Supreme Court, the federal agencies involved need not take any steips to insure that they are being consistent with our coastal program. That is why it is imperative that Congress enact these amendments to section 307(c)(1) of the CZMA.

II. SECRETARY OF THE INTERIOR V. CALIFORNIA

A. State of affairs prior to the opinion

Prior to the ruling of the Supreme Court in *Secretary of the Interior* v. *California* (1984) 104 S.Ct. 656, it was generally agreed that section 307(c)(1) applied to federal activities occurring both landward and seaward of the coastal zone. This agreement was based upon the National Oceanic and Atmospheric Administration's (NOAA) regulations which provided:

"Federal activities outside of the coastal zone (e.g., on excluded federal lands, on the Outer Continental Shelf, or landward of the coastal zone) are subject to federal agency review to determine whether they directly affect the coastal zone." 15 C.F.R. § 930.33(c).

No question had ever been raised regarding a geographical limitation on section 397(c)(1). Indeed, in the litigation over OCS Lease Sale 53 which resulted in the Supreme Court's opinion, the Department of Interior did not assert a geographic limitation, and in fact, before the Ninth Circuit Court of Appeals, Interior conceded that OCS lease sales were subject to section 307(c)(1). Moreover, it should be noted that NOAA's regulation has not changed for a number of years. Even since it was proposed in 1976, federal agencies and coastal states had understood that there was no geographic limitation on section 307(c)(1). States have conducted consistency review over activities both landward and seaward of the coastal zone but without abusing or overreaching in either direction. In particular, the California Coastal Commission had been very careful to limit its assertion of consistency landward of the coastal zone to those federal activities having clear and significant impacts on the coastal zone. Furthermore, this assertion of jurisdiction has usually been limited to federal activities within a few miles of the coastal zone.

The primary question which had arisen with regard to section 307(c)(1) was whether its triggering mechanism, i.e., the phrase "directly affecting the coastal zone," was to be given an expansive definition. California, along with the other

coastal states, has consistently contended that Congress had intended the trigger for section 307(c)(1) to be interpreted broadly. Interior, on the other hand, had asserted that the proper interpretation of the triggering mechanism was very restricted. It was this issue of an expansive versus a restrictive interpretation of "directly affecting the coastal zone" that was presented to the Supreme Court for resolution but which the Court did not resolve.

The other major problem area which existed was the degree of consistency required for federal activities which directly affected the coastal zone, i.e., what did "consistent to the maximum extent practicable" mean. NOAA had defined "consistent to the maximum extent practicable" to mean that federal activities had to be fully consistent with state programs unless compliance was prohibited by existing federal law. A federal agency could also deviate from full consistency if that deviation was justified because of some unforseen circumstance arising after approval of the management program.

The degree of consistency required by section 307(c)(1) did not pose significant problems in California until late 1983. Where federal agencies and state agencies disagreed about the consistency of a federal activity, discussions, cooperation and coordination resulted in agreements which resolved the concerns of the state agencies. It was exactly in this cooperative fashion that Congress had intended section 307(c)(1) to operate. However, following the Ninth Circuit's ruling in the Lease Sale 53 litigation (*California* v. *Watt* (9th Cir. 1982) 683 F. 2d 1253), finding that federal OCS lease sales directly affected the coastal zone, Interior started preparing consistency determinations. The determination prepared by Interior for OCS Lease Sale 73 offshore Central California presented the first situation in which a consistency determination prepared by the Department of Interior was challenged legally. This lawsuit, *State of California* v. *Clark* (C.D.Cal. CV No. 83.7235), illustrated the need for a further specification of the obligations imposed on federal agencies. Interior prepared a determination of consistency which contained only a pro forma review of the California Coastal Management Program (CCMP) and which completely ignored NOAA's regulations implementing the statutory standard of "maximum extent practicable." When Interior refused to enter into any discussions of the matter, the California Coastal Commission was forced to initiate a lawsuit to obtain Interior's compliance with the law.

B. The Supreme Court's opinion

As noted above, the question presented to the Supreme Court was whether OCS Lease Sale 53 directly affected the California coastal zone such that the consistency requirements of section 307(c)(1) were triggered. The Department of Interior contended that the lease sale did not directly affect the coastal zone because there would be no physical impacts without intervening federal decisions. California contended that there were direct effects because the lease sale initiated a series of events of coastal management consequence. Thus, the legal briefing in the case focused on the meaning which Congress had intended to attach to the phrase "directly affecting the coastal zone."

Although the question presented to the Court was limited to OCS lease sales, the manner in which the Court answered that question leaves no doubt that all federal activities on the OCS are exempt from the consistency requirements of section 307(C)(1). The primary basis on which the Court found OCS lease sales to be exempt was a holding that Congress had systematically rejected attempts to extend the CZMA to the OCS. Based upon refusal of Congress to extend the CZMA to the OCS, as well as a determination that the addition of "directly affecting" to section 307(c)(1) was only a "modest compromise, designed to offset in part the narrower definition of the coastal zone favored by the Senate and adopted by the Conference Committee [A]," the Court concluded:

"Section 307(c)(1)'s 'directly affecting' language was aimed at activities conducted or supported by federal agencies on federal land physically situated in the coastal zone but excluded from the zone as formally designed by the Act."

Because the Court focused upon the perceived refusal of Congress to extend the CZMA to the OCS, and limited section 307(c)(1) to federal activities physically within the coastal zone, there is no doubt that all federal OCS activities are excluded from the consistency requirements of section 307(c)(1).

Moreover, many reading the opinion believe that the Court has also exempted those federal activities occurring landward of the coastal zone from section 307(c)(1). Of course, the Court was not faced with the question of consistency for a federal activity occurring landward of the coastal zone, but the clear statements by the Court limiting section 307(c)(1) to the coastal zone will surely provide a substantial obstacle to assertion of such jurisdiction. It seems unlikely that a federal district

court or federal appellate court would ignore the Supreme Court's clear statements and rule that a landward federal activity is subject to consistency under section 307(c)(1).

Because section 307(c)(2) applies to federal activities in the coastal zone, the Court may have effectively limited section 307(c)(1) to federal activities occurring on federal enclaves in the coastal zone. This is a far more restrictive interpretation of section 307(c)(1) than was intended by Congress. This is also far more restrictive than NOAA's regulations specified.[1]

By using a geographic approach to section 307(c)(1), the Supreme Court avoided resolution of the question of the meaning of the triggering mechanism of "directly affecting." However, the Court did briefly address whether or not Lease Sale 53 directly affected the coastal zone. The Court concluded that because "activities may not begin until separate federal approval has been obtained, and approval can be denied on several grounds . . .," an OCS lease sale did not directly affect the coastal zone. Thus, even in its brief discussion of "directly affecting" the Court has indicated that it beleives the term should be narrowly defined.

The Supreme Court, because it ruled that OCS lease sales are exempt from section 307(c)(1), did not reach the issue of the meaning of "maximum extent practicable." The Ninth Circuit's statements are left as the most authoritative discussion of the meaning of "maximum extent practicable." The Ninth Circuit's discussion of this standard was vague but it did indicate that full consistency was not required. This conclusion was reached without any reference to NOAA's regulations which call for full consistency unless limited exceptions apply. If Congress does not act to clarify this area, federal agencies will rely on the statements of the Ninth Circuit and attempt to lower their burden of consistency.

C. The impacts of the Supreme Court's decision

The decision of the Supreme Court in the Sale 53 litigation poses major problems for coastal states. First, because the Supreme Court has apparently limited the application of section 307(c)(1) only to activities occurring within the physical confines of the coastal zone, many federal activities which have major impacts on the coastal zone are competely exempted from review. The most ready example is of course Outer Continental Shelf (OCS) oil and gas leasing. However, other significant activities will also be exempted, e.g., all other mineral leasing and the disposal of hazardous materials such as discarded nuclear submarines. These activities can seriously disrupt the ability of a state to manage its coastal zone, but now federal agencies may proceed with such activities without taking a state's coastal management program into consideration.

The Court also has left unresolved disputes over the meaning of "directly affecting" and of "maximum extent practicable." The Supreme Court indicated that section 307(c)(1) could only be triggered by an activity with major physical impacts on the coastal zone, but this approach is completely contrary to the clear statements of Congress in both 1971 and 1980. Without congressional action, this will remain an area ripe for disputes between the States and federal agencies.

A similar situation exists with regard to "maximum extent practicable." The meaning of that phrase has not been resolved and until the extent of the obligation imposed on federal agencies is made clear, this simply poses another area fertile for litigation.

The net result of the Supreme Court's opinion has been to completely disrupt the process which Congress attempted to construct in 1972. The Court has drastically reduced the scope of the promise Congress made to the states at that time that federal agencies would undertake activities in a fashion which was consistent with state coastal programs. In reaching this conclusion, the Court avoided resolution of the actual issues presented to it forcing all parties into an area of ambiguity. The only way that this situation can be resolved is for Congress to enact appropriate legislation such as the bill which is currently pending before this panel.

III. THE PROPOSED AMENDMENTS TO SECTION 307(C)(1) ARE NECESSARY TO EFFECTUATE THE INTENT OF CONGRESS IN ENACTING THE CZMA

This panel is considering a bill which addresses all three of the problem areas associated with section 307(c)(1): 1) the geographical scope of the section; 2) the meaning of the triggering mechanism i.e. "directly affects"; and 3) the extent of the

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[1] Attached is California's brief before the Supreme Court which contains a review of the legislative history of section 307(c)(1). That history indicatd the intent that the section be viewed broadly. (Retained in committee files.)

obligation of federal agencies to be consistent. The proposed amendments make clear that section 307(c)(1) applies to federal activities occurring both landward and seaward of the coastal zone as well as within the coastal zone, that consistency review is necessary for federal activities which initiate a series of events of coastal management consequence, and that the basic obligation placed on the federal agencies is that they conduct their activities in a fashion fully consistent with approved coastal programs. It is wholly appropriate that this corrective legislation be enacted.

At the outset, it must be noted that these amendments do not make radical changes in section 307(c)(1). Rather, the amendments simply return the situation to the status quo which existed prior to the Court's opinion. As noted above, prior to that ruling, section 307(c)(1) applied to activities seaward and landward of the coastal zone. Similarily, in 1980, Congress made it clear that the triggering mechanism of the statute was to be interpreted broadly and that the obligation of federal agencies was to achieve full consistency. Thus, the amendments do not represent a major change but a return to the original concept of the statute and a fulfillment of the promise made to the coastal states in 1972.

The need for this legislation is highlighted by the federal activity which started the dispute over section 307(c)(1)—OCS lease sales.

This committee must recognize that the decision to lease has dramatic implications for the coastal zone. Interior is essentially subdividing the OCS, creating both a right to explore and develop and the conditions under which development can take place. Interior is making choices which will determine or influence whether oil will be transported in pipelines or by tankers, thus determining which areas will be exposed to the damage of oil spills and the degree of danger. Interior is making decisions as to whether additional stipulations are required to protect biological resources or air quality. Interior is making decisions which will affect where onshore support facilities are going to be sited.

Only at the lease sale stage can a tract be deleted because its development would not be consistent with an approved coastal program. Only at the lease sale stage can Interior insert the extra stipulation necessary to protect biological resources or air quality and thus bring about consistency. Only at the lease sale stage can Interior determine the cumulative impacts of the leasing and development which will follow. Interior cannot make these determinations at any later point in time. It is because these decisions are critical for consistency that section 307(c)(1) must apply to OCS lease sales.

Also, tanker accidents such as the *Torrey Canyon* and the *Amoco Cadiz* demonstrate, consolidated pipeline systems are environmentally preferable to tankering. However, a requirement that such systems be used can only be imposed when there is adequate time for oil companies to coordinate and plan for such systems. Once the oil is ready to be brought to shore, it is too late to seek this protection of the coastal zone.

Moreover, when Interior has leased a tract, the question whether that tract will be developed depends only on the amount of oil found. In leasing a tract, Interior receives massive bonus bids—some as large as $333 million—for the right to explore and develop. Once an oil company bids $333 million for an OCS tract, a tremendous inertia is created to insure that the tract is developed. If a tract cannot be developed consistently with a state program, it is fairer to the state and to the bidding company to come to grips with that issue before deciding to offer the tract for lease instead of after, especially because Interior has never barred a company from exploring and developing a leased tract.

Moreover, a comprehensive consistency determination is not beyond Interior's ability. Interior prepared a number of consistency determinations on OCS lease sales following the ruling of the Ninth Circuit in *California* v. *Watt* (9th Cir. 1982) 683 F.2d 1253. Most of the states which received these determinations concurred with them, or Interior and the state were able to work together to resolve problems. Interior also prepared a consistency determination for Lease Sale 73 (Central California). This consistency determination demonstrates why Congress must make clear the obligations imposed on federal agencies.

Within the allowable time period following receipt of the determination, the California Coastal Commission brought a number of defects to Interior's attention and offered to work with Interior to resolve the problems. Interior steadfastly refused to meet with the Coastal Commission, or to alter the sale to make it consistent with California's program. Congress must make clear that this type of agency approach to consistency is unacceptable and that federal agenicies are expected to enter into the process wholeheartedly.

One objection often raised to consistency is that it gives states the ability to "veto" federal agencies. However, this objection does not withstand careful review.

The CZMA itself is a carefully crafted scheme which spells out the very federal and states' rights that are at issue. Federal-state cooperative planning and coordination are at the heart of the Act. As a result of this statutory scheme, states with federally approved coastal zone management programs are given a greater role in OCS decisionmaking than states without such programs. See e.g., 16 U.S.C. § 1456(c)(3)(B). However, the entire statutory scheme has built-in federal controls and safeguards that prevent any arbitrary exercise of the state's consistency rights.

Federal agencies exercise significant power over the content of coastal zone management programs. While states initially develop such programs, they have no effect under the CZMA unless they meet national criteria and are approved by the federal government. 16 U.S.C. §§ 1455(c), 1456(c)(1). The Secretary of Commerce may not give the required approval "unless the views of federal agencies principally affected by such program have been adequately considered." 16 U.S.C. § 1456(b). Interior is among the federal agencies consulted during this process, and specially was involved in the approval of California's Coastal Zone Management Program.

Moreover, Congress gave special attention to energy production, both on the OCS and elsewhere. Unless the Secretary of Commerce finds that a state program provides for adequate consideration of the national interest in energy production, he must disapprove it. 16 U.S.C. § 1455.[2] The only recourse available to a state under these circumstances is to persuade a court that the federal agency has not met its statutory obligations. This can hardly be characterized as a "veto" of the federal activity.

A final point which has been raised specifically with regard to OCS lease sales is that review under section 307(c)(1) is unnecessary because of section 19 of the Outer Continental Shelf Lands Act (OCSLA). 43 U.S.C. § 1345. This argument misses the mark on several bases. First, section 307(c)(1) deals with many federal activities other than OCS lease sales. Section 307(c)(1) has never contained an exemption for OCS lease sales, and we urge Congress to make absolutely clear now that OCS lease sales are covered by this statute.

Second, section 19 does not overlap with section 307(c)(1). In providing recommendations on a lease sale pursuant to section 19, a governor is not required to take a coastal management program into account. Moreover, there may be occasions where a governor does not provide recommendations under section 19, or where those recommendations are properly rejected by the Secretary. Under these circumstances, the state coastal management program would not influence the federal decision at all, a clear perversion of the intent of Congress in enacting the CZMA.

IV. CONCLUSION

In enacting the CZMA in 1972, Congress was pursuing a broad goal of managing, protecting and preserving one of our great natural treasures, the coastal zone. It was the determination of Congress that the best approach to this task was to encourage the coastal states to develop comprehensive management programs which were sensitive to the needs and objectives of federal agencies and were also subject to federal approval. The promise made to the states was that upon federal approval of a program, federal agencies would conduct their activities in a fashion consistent with the programs. The Supreme Court has now excised a major component of that promise leaving states with programs, but also leaving many federal agencies free to conduct their activities without regard for the program. It is this wrong which Congress is now called upon to correct, and it is the correction of this wrong which is necessary to the management of our coastal zone. For these reasons, I urge passage of this legislation.

The CHAIRMAN. Thank you, sir.

Mr. Delaney?

Mr. DELANEY. Thank you, Mr. Chairman.

I am Richard Delaney, vice chairman of the Coastal States Organization and assistant secretary of environmental affairs of the Commonwealth of Massachusetts. I am here today on behalf of the 35 Governors who compose the Coastal States Organization to

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[2] Indeed, California's program has been specifically reviewed on the question of whether it satisfied this requirement, and the Ninth Circuit ruled that it did. *American Petroleum Institute* v. *Knecht*, (9th Cir. 1979) 609 F.2d 1306, 1315. Furthermore, the Court found that the California Program and the CZMA contained adequate safeguards to protect against any arbitrary exercise of the state's consistency powers. *Id.*

convey our strong support for your bill, S. 2324, and also to thank you, Mr. Chairman, and other members of the committee, for moving quickly to schedule these hearings and address this issue. It is an issue that will have dramatic implications for coastal States and is, of course, central to the States' ability to provide good, sound coastal management for this Nation's coastal resources.

We feel it is imperative that this legislation be enacted quickly to counter what we believe is a serious misinterpretation by the Supreme Court in its decision in the case of *California* v. *Interior*. I have submitted on behalf of the Coastal States Organization detailed testimony which I trust will be accepted for the record, and would just take my few minutes now to highlight two or three of the main themes from that testimony.

I would like to note that we developed this testimony after extensive discussions and consultation with many of the Governors' offices, the attorneys' general offices, people in the coastal zone programs and fisheries and wildlife programs throughout most of the 35 States and territories.

I would say that there is a strong feeling among the States that the impact of this Supreme Court decision goes well beyond the OCS lease sale activities, as you have said earlier this morning, Mr. Chairman, and that has alarming consequences for our coastal States.

To cite a few of the examples: The Gulf and the Mid-Atlantic States are faced with the potential for an EPA site designation for the at-sea incineration of toxic wastes. Those States are very concerned about the potential impacts on their coastlines.

All States are faced with the potential and ongoing dumping and disposal of all sorts of materials into their coastal waters and offshore waters ranging from sewage sludge, low level radioactive waste, decommissioned submarines, and numerous other materials. These activities would be exempted from State review under the existing interpretation of the Supreme Court.

The west coast States face in the near future the possibility of seabed mining in the Gorda Ridge. Again, the only opportunity for review by those States would be under the coastal zone management consistency provisions.

Likewise, there are activities landward of the coastal zone that have potential effects that coastal zone managers and State Governors would be concerned about. It is not a new concept for coastal zone management programs to look at landside activities when they do affect the coastal zone. In fact, NOAA has promulgated regulations that acknowledge that they should be examined and reviewed under Federal consistency.

In our survey, we found that review of land-based activities has been used sparingly and judiciously by States. There have been no major problems in this area. The States look primarily at the effect of the activity on the coastline not the location. The daming of rivers, channelization of streams, the diversion of rivers all can have serious consequences on the coastal systems by interrupting the nourishment of sand to beaches on the coastal zone, interfering with fish migrations, et cetera.

A second major theme that was repeated by many of the coastal States was that there is a misconception about the extent of the CZMA in terms of its Federal consistency authority. Clearly the consistency review was not intended to be an outright veto by the States. State programs are developed in conjunction with Federal agencies. They have to address national interests. They have to be approved by the Department of Commerce. What I have described is the intent of Congress, which was to build a mechanism for consultation and coordination, not a States' rights veto power. I think the States have used that mechanism accordingly.

In conclusion, I would suggest that the language of the act, of S. 2324, is strongly supported by the Coastal States Organization; that we very much support the definition of direct effect as you have outlined it. It is very parallel to the policy objectives that were outlined in the Coastal Zone Management Act of 1972. We would suggest some more precise language in the definition of national security as one of the potential exemptions.

We thank you for the opportunity to endorse this legislation. We look forward to working with your committee.

[The statement follows:]

STATEMENT OF RICHARD DELANEY, VICE CHAIRMAN, COASTAL STATES ORGANIZATION

Mr. Chairman, I am Richard Delaney, Vice chairman of the Coastal States Organization (CSO) and Assistant Secretary of the Massachusetts Executive Office of Environmental Affairs. I'm here today on behalf of the CSO and the governors of 35 coastal states and territories to convey our support for S. 2324, legislation to amend the consistency provisions of the Coastal Zone Management Act (CZMA).

The CSO member states would like to thank the Chairman and this Committee for moving quickly to schedule hearings on an issue which has such dramatic and far-reaching implications for state coastal management efforts. We agree that the U.S. Supreme Court erred in its interpretation of the CZMA and misread congressional intent in ruling on January 11 in the case *Interior* v. *California*. This legislation is essential to correcting the Court's ruling—a decision which threatens to weaken the primary incentive specifically built into the CZMA to enable coastal states to work a partners with the federal government in managing our nation's coastal resources.

If the Court's ruling is allowed to stand, the opportunity for the states and the federal government to resolve their differences over proposed federal activities which could affect a state's coastal zone will have been lost. The Court's decision is simply bad government. It must be reversed by Congress and this legislation is the vehicle for doing so.

Unless S. 2324 is enacted, we fully expect the Administration to proceed with regulations which would severely limit state participation in those federal activities whose impact on national coastal management may prove disastrous. Similar rulemaking was attempted nearly three years ago as a result of mediation between the Department of the Interior and the State of California over OCS lease sale 48. The proposed rules were, fortunately, withdrawn under the CZMA's two-houses veto provision. This time, however, the Committee may not have such an option to block the expected regulations.

The CSO is also concerned that the Court's decision potentially exempts from state review all federal activities occurring outside the limits of the state's coastal zone. Federal activities such as ocean dumping, ocean mining, timber sales, water diversions, and federally-sponsored ocean incineration could, for example, occur within one inch of a state's coastal zone, regardless of state interests or concerns or whether these activities could adversely affect the coastal zone's natural resources. This separated management scheme for our nation's ocean and coastal resources does not embrace, we believe, the true intent of Congress under the CZMA.

CZMA CONSISTENCY AUTHORITY

The CZMA was designed primarily to help states develop, with federal approval, coastal management programs that would weigh the demand for increased develop-

ment against the need to conserve and protect the lands and waters surrounding 95,000 miles of U.S. coastline. To encourage state participation in this voluntary federal program, the CZMA provided states with two incentives. The first was direct federal grant assistance. The second incentive took the form of "consistency" provisions under Section 307 of the Act, language which assured participating states that their coastal management plan would not be pre-empted by conflicting or opposing federal action. The CZMA, thus, formed the basis for a carefully constructed partnership between the states and the federal government. The states agreed to abide by federal guidelines in developing their coastal programs provided federal agencies would try, "to the maximum extent practicable," to make activities "directly affecting" a state's coastal zone "consistent with" that state's efforts to protect its coastline.

Instead of the Court's narrow view of consistency review authority, S. 2324 reflects the broader interpretation originally intended by Congress—nearly consultation between the federal government and the states and a cooperative partnership set up to manage the nation's ocean and coastal resources.

An informal survey conducted by the National Oceanic and Atmospheric Administration (NOAA) in 1982 revealed a remarkably low percentage of disagreement between states with approved coastal programs and federal agencies in the consistency review process. In only 3 percent of the federal projects reviewed under Section 307(c)(1) did coastal states disagree with the findings of the federal agency conducting the review. Of approximately 7500 federal licenses reviewed for consistency by states under Section 307(c)(3), only 2 percent were disputed. This low percentage is proof of the effectiveness of the cooperative coastal management approach embodied in the CZMA's consistency provisions. Unless S. 2324 is enacted, the Supreme Court's strict interpretation of "directly affecting" will more than likely increase the number of cases brought by states against private parties under Section 307(c)(3).

Consistency review does not, and was never intended to, give a state unilateral control over federal activities affecting its coastal zone. State CZM programs receive no federal financial assistance or legal authority until state coastal plans are reviewed and approved by the Secretary of Commerce. During the process of CZM program development and approval, extensive consultation and coordination between a state and federal authorizing agencies is required. The degree of consultation and coordination between federal and state government required by the CZMA is greater than any other planning or resource management program under federal law. To obtain such approval, a state plan must take into account the "national interest" and the "view of the federal agencies principally affected by such programs." The lengthy process by which federal agencies approved state CZM programs was intended to identify and resolve problems in administering the programs before they actually occurred.

Consistency provisions in Section 307 of the CZMA have never provided a state with veto power over federal activities. Instead, Section 307 establishes a process for conflict resolution based on discussion and negotiation of differences. In the event that a state found a federal activity inconsistent with its approved coastal program, the state was required to notify the agency of its objections. If differences between the state and federal agency could not be resolved informally, the dispute would then be brought before the Secretary of Commerce for mediation and resolution. This system of conflict resolution was established primarily to avoid state-federal confrontation in court. Even the Supreme Court noted in its opinion that "collaboration among state and federal agencies is certainly preferable to confrontation in or out of the courts."

Member states of the CSO believe that the federal consistency provisions are the single most important conflict resolution mechanism available to both states and federal agencies in ocean and coastal resource management.

INTERIOR V. CALIFORNIA

The Supreme Court's 5-to-4 decision in this case excluded all federal activities occurring outside the geographic boundaries of a state's coastal zone from review under Section 307(c)(1). The Court's narrow reading of this important provision has serious ramifications that go far beyond federal OCS leasing activity.

If the opinion is not reversed by Congress, any federal activity occurring within the bounds of a state's coastal zone may be completely exempt from state review. This is an especially serious consequence of the Court's ruling, given the long-range impact which many of these federal activities could have on the coastal zone.

A number of federal activities other than OCS oil and gas leasing occur outside a state's coastal zone. For instance, the Gulf and mid-Atlantic coastal states are being considered by the Environmental Protection Agency as possible sites for ocean incineration of toxic waste; certainly these states should have an opportunity to participate in an environmental decision of this magnitude. Elsewhere, the Department of the Interior intends to lease mineral development rights off the Oregon and California coasts. Undersea mining will involve significant changes in the sea floor and the disposal of large volumes of tailings; consistency review may be the only opportunity for state involvement in federal activities that hold such potential for damage to the nation's coasts.

The Supreme Court's decision also creates a loophole for federal activities occurring outside the coastal zone which require a federal permit. Although federally-permitted activities come under the jurisdiction of Section 307(c)(3), NOAA regulations exempt consistency review under Section 307(c)(3) when the permit applicant is a federal agency (15 CFR 930.52). Consequently, federally-permitted activities taking place outside the coastal zone are also exempt from state review. This excludes activities such as the dumping of dredged material by the Army Corps of Engineers and the ocean disposal of decommissioned nuclear submarines off the California and North Carolina coasts proposed earlier by the Navy.

The Court's opinion would seem to also exempt all federal activities landward of the coastal zone. While states have used their consistency review authority in disagreements over landward federal activities infrequently, it is, nevertheless, important that states retain this opportunity for consistency review. All federal activities which disrupt the quality and quantity of coastal waters, estuaries and related resources could very well be exempt from state review under the Court's ruling merely because the activity happens to take place a few feet inland of the coastal zone boundary. Stream channelization and the construction of dams on rivers located upstream of the coastal zone, for instance, are known to have jeopardized coastal beaches by depriving them of a steady supply of sand. Federal timber management practices on public lands adjacent to the coastal zone can seriously alter marine water quality and increase sedimentation because of erosion into coastal streams.

Few, if any, federal programs have a greater impact on the coastal zone than oil and gas leasing on the Outer Continental Shelf. Offshore oil and gas operations present unique equipment and transportation problems and pose unusual perils to the fragile ecosystems of the coastal zone. Yet, a majority of the Court termed the selection of lease sale tracts and the award of OCS leases as events that do not directly affect the coastal zone nor require federal adherence to state coastal plans. The CSO strongly disagrees with the Court's opinion on this point, in particular, as do the sponsors of S.2324.

The selection of tracts and the transfer of OCS leases by the federal government is the last stage at which any meaningful cooperation between the affected states and the federal government can be achieved. Unlike the Court, the CSO believes that the OCS leasing process sets into motion a chain of events which is likely to affect a state's coastal zone directly and that such actions should be subject to the consistency provisions of the CZMA. If not, cooperative consultation between the federal government and the states will be supplanted by increased uncertainty and risk to the lessee. The exclusion of federal OCS lease sales from consistency requirements may even depress future lease sale values.

LEGISLATIVE RECOMMENDATIONS

The CSO supports the definition of "directly affecting" in S. 2324. This definition, which includes physical, biological, social and economic consequences, clearly agrees with the objectives of the CZMA. The Act specifies encouraging and assisting states to give "full consideration to ecological, cultural, historic and aesthetic values as well as to needs for economic development" (16 USC s. 1452 (2)). The other component of the term "directly affecting"—that of initiating a chain of events—is extremely important for effective coastal zone management. This definition insures that states will become involved at the early stages of complex federal activities. Early state participation is essential for effective intergovernmental coordination. Otherwise, states will be forced to react rather than cooperate.

The CSO recommends that the consistency exemption language is S. 2324, "necessary for reasons of national security," be more precisely defined. The lack of clear and succint phraseology could easily be misinterpreted and may hamper federal compliance with the consistency provisions of the CZMA. A definition of "national security" referencing national defense purposes or military preparedness is recommended.

FISHERY MANAGEMENT PLANS IN RELATION TO CZMA CONSISTENCY AUTHORITY

The CSO believes that fishery management plans which directly affect a state's coastal zone should be fully consistent with that state's CZM program. The Magnuson Fishery Conservation and Management Act specifically allows regional fishery management councils to incorporate the necessary fishery conservation and management measures adopted by those coastal states nearest to the fishery.

NOAA, in a November 1982 letter from Administrator Byrne, agreed that ". . . the two statutes are fundamentally compatible and that either statute may be administered in a manner consistent with the other." The letter also regarded a majority of fishery management plans as activities that directly affected the coastal zone.

The CSO finds no evidence to indicate that state consistency review has, in any appreciable way, obstructed the development of fishery management plans or caused harm to the nation's valuable fishery resources. We believe the disagreement between the State of Florida and the Southeast Regional Fishery Management Council regarding the use of purse seins is the exception, not the rule.

CONCLUSION

The CSO strongly urges Congress to enact S. 2324 or similar legislation to restore the federal-state partnership that had been so severely weakened by the Supreme Court's decision on *Interior* v. *California*. Passage of S. 2324 is necessary in order to re-establish congressional intent concerning the CZMA, reaffirm the federal government's commitment to coastal states in the administration of the national coastal management program, and encourage state participation and cooperation in federal decisions affecting their coastal zones.

Coastal states seek no new authority, but rather a true partnership with the federal government that Congress intended under the CZMA. The CSO believes S. 2324 will help correct what the Court has so seriously misinterpreted and supports passage of S. 2324 without weakening amendments.

The CHAIRMAN. You know, I think what has happened here, before Jim Ross testifies, is that the Supreme Court has handed the Federal Government a plum, that they did not even really anticipate when they argued the case. My hunch would be most of the people at NOAA and the Department of Commerce never really thought that this law meant that all Federal activities are exempt, and that really only oil and gas drilling, not even leasing, but drilling was maybe covered.

I will also bet you that if President Reagan were still Governor Reagan, he would be on the same side of this issue as the three of you are on. The longer I serve here, I discover that philosophy gets somehow subjected and finally driven under by practicality.

Whatever government you are in, you want that government to have preemptive power. If you happen to be in a State government, that is what you want. If you happen to be President, then you do not want to be bothered by the States with carrying out what you regard as the public good.

And yet, philosophically I am convinced that the President would clearly be on the side of the States having a very strong hand in this if he were looking at this from a totally neutral position. My hunch is that the President has not even made a decision on this. The decision was made much lower down than where he is, but at heart, he ought to be on the side that the three of you are on.

Our last witness on the panel is my good friend, Jim Ross, who I have known for a number of years. He directs Oregon's Land Conservation and Development Commission, a statewide land use planning organization. We have had how long now, Jim, 10 years, 12 years?

Mr. Ross. Ten years.

The CHAIRMAN. Ten years. It is widely accepted by the people of Oregon. There is a small group that does not like it, and every year or so they attempt to initiate onto the ballot an effort to repeal it, and it goes before the State voters for approval or disapproval, and consistently by very large margins the State voters opt each year to keep our act, and it has worked out very fine. Part of the reason it has worked out fine is because of the excellent administration by Jim Ross. Jim.

Mr. Ross. Thank you, Mr. Chairman. I want to thank you for the opportunity to testify here this morning.

Oregon is here in support of S. 2324. It is not surprising that there would be some parallel in the testimony from the Coastal States Organization, Oregon, and California; therefore, I think I will be quite brief. I have three observations to make this morning, one suggestion, and one plea.

Observation No. 1. I would state that in contrast to what we heard from the first panel, to echo your's and Senator Cranston's comments, this bill does not expand the authority of the Coastal Zone Management Act; rather, it restores the congressional intent that was so badly shattered, in our collective opinions by the 5-to-4 decision by the Supreme Court.

Observation No. 2. I think there is apt to be some attention—there was yesterday; there likely will be today—regarding the landward/seaward language that is contained within your bill, Mr. Chairman. That is the language that is the locational test that the Supreme Court should have upheld.

But this is not the crux. The crux of the issue is whether or not an activity, as you stated earlier, Mr. Chairman, directly affects the coastal zone. I think the bill's definition of "directly affects" is an excellent one. To really paraphrase what your bill says, a Federal activity beyond the State's coastal zone should be reviewed by State coastal zone management agencies only if it is the functional equivalent of a Federal activity occurring within the coastal zone. I think that is a very fair and reasonable test.

Observation No. 3. The bill does provide one very important clarification, and that is the vague "maximum extent practicable" standard or, perhaps, nonstandard, has been replaced with an absolute standard with specific exemptions. The important point I would leave here is this will reduce litigation and litigative costs and, therefore, tax dollars at the State and Federal level as well as perhaps the local government level.

Now one suggestion, and to echo what has already been said, there needs to be further clarification of the national security exemption. Mr. Chairman, the exemption should be granted, again to echo General Van de Kamp's comments, for Federal activities which are indispensable elements of our Nation's military preparedness.

Second, each Federal agency should not be able to arbitrarily assert a national security exemption and, therefore, it should be granted by one person. That would be presumably the Secretary of Commerce, perhaps after consultation with the Secretary of Defense.

Now for the plea. The State of Oregon would ask you, Mr. Chairman, not to exempt the regional fisheries management plans from

the Federal consistency requirements, or at least to not exempt it in the manner that has been proposed and you will hear more about from other speakers here today. I think, Mr. Chairman, that would establish a very poor precedent, a precedent that could result in serious erosion of the Coastal Zone Management Act, coming perhaps as soon as this bill were to hit the floor of either House.

As your questions of Mr. Tweedt demonstrated earlier, State programs already recognize regional and national interests. The Commerce Secretary would not approve a program or an amendment to a program which contained policies to frustrate the administration of the Magnuson Act. The acts are compatible.

As the NOAA Administrator indicated in letter No. 37, if problems do arise—and I have not heard this mentioned either in the testimony yesterday or so far today—your exemption No. 3 would allow specific provisions of the Magnuson Act to override State coastal policies, and that is a very important point, I believe.

Oregon's program is one of only several which have federally approved, enforceable fisheries policies, Mr. Chairman. In Oregon our policies are designed to protect the natural resources of the territorial sea, the estuaries, the riparian habitats and watersheds, and we also have a fisheries enhancement program designed to restore our depressed fisheries.

It makes very little sense for Oregon to spend State funds to protect and restore these resources and then not have adult salmon return from the Federal fisheries conservation zone to either spawn naturally or to provide eggs for the State of Oregon hatcheries. We may need to use our program someday in terms of Federal consistency with the regional fisheries management program to ensure that the Pacific Fisheries Management Council includes adequate natural spawning escapement goals within its plan.

However, as you will hear from Mr. Greenberg, or at least in his written material, he has stated significant problems have arisen in other States where fisheries management objectives are incorporated in coastal zone management programs.

Mr. Chairman, that has not happened in the State of Oregon, in spite of that assertion in his testimony. It has not happened because of Federal consistency, not in spite of it. The very presence of Federal consistency requirements is what insures the coordination between State and Federal fishery managers and, as a result, the State of Oregon has always been able to find the Pacific council plans consistent with the coastal management program.

In conclusion, Mr. Chairman, a regional fisheries group will be attempting to promote its local interests into a proposed exemption to Federal legislation. This local dispute, in Oregon's opinion, does not warrant a legislative remedy, at least not a legislative remedy of the nature that is going to be proposed.

Thank you.

[The statement follows:]

STATEMENT OF JAMES F. ROSS

Senator Packwood and members of the Committee, my name is James F. Ross. I am Director of the Oregon Department of Land Conservation and Development, Or-

egon's coastal zone management agency. I speak today in support of S. 2324, a bill to amend the Coastal Zone Management Act of 1972.

The members of this Committee are aware of the Supreme Court's January 11, 1983, decision, *Secretary of the Interior* v. *California*. The Court ruled in a five to four opinion that the activities of federal agencies need not be consistent with the provisions of federally approved, state coastal zone management programs if these activities occur beyond the states' coastal zones. The erroneous standard the Court established is strictly geographical. A federal activity could occur one inch beyond a state's coastal zone, its effects could be devastating, and that state would be unable to review the activity under Section 307(c)(1) of the Coastal Zone Management Act. This is not the standard that the Congress intended when it passed the Coastal Zone Management Act, nor is it the promise made to the states when they prepared their coastal zone management programs and submitted them to the Secretary of Commerce for approval.

S. 2324 will rectify the decision of the Supreme Court by codifying a correct interpretation of legislative history and by embracing the logic of the Supreme Court's four dissenters. The bill does this by establishing a standard based upon the effects of federal activities rather than their locations.

I would encourage the Committee to note that the parenthetical language of S. 2324, "whether within, or landward or seaward of, the coastal zone," is the locational test which the Supreme Court should have upheld, but this is not the crux of the consistency issue. It is not so much the location of the federal activity that is important, but the direct effects the activity may have on the coastal zone. The S. 2324 definition of "directly affects the coastal zone" is excellent. A federal activity beyond a state's coastal zone should be reviewed by state coastal zone management agencies only if it is the functional equivalent of an activity occurring within the coastal zone. The listing of physical, biological, social, and economic consequences, and the chain of events test will assure that the functional equivalent standard can be understood and readily applied by federal agencies.

The bill replaces the vague "maximum extent practicable" standard with a requirement for federal activities to be fully consistent with state coastal zone management programs unless these activities fall within one of three categories of exemptions. As administrator of Oregon's coastal zone management program, I can assure the Committee that this amendment will reduce litigation. State and federal agencies will be hard pressed to misinterpret their responsibilities if this bill becomes law. Oregon made similar changes in its statewide land use program. By changing vague state standards to clear and objective standards with clearly enunciated exceptions, the state has significantly reduced litigation for the purpose of policy interpretation.

I am, however, concerned that the language of the proposed national security exemption is much too broad. The Committee should include standards for the use of this exemption. The exemption should be granted only for federal activities which are indispensable elements of our Nation's military preparedness. Also, each federal agency must not be able, unilaterally, to assert a national security exemption. This exemption should be granted by only one federal official, presumably the Secretary of Commerce in consultation with the Secretary of Defense. If this exemption is not defined, I anticipate a new round of litigation for the purpose of determining which federal activities are in interest of national security.

I have also heard that this Committee is considering the inclusion of a new exemption for regional fishery management plans. I strongly oppose such an exemption. It is my opinion, and apparently the opinion of the NOAA Administrator, that there are no conflicts between the Magnuson Act and the Coastal Zone Management Act. Even if unforeseen conflicts should arise, the third exemption of S. 2324 clearly states that specific requirements of federal law, such as the Magnuson Act overfishing standard, would override state coastal policies. The following are my reasons for opposing the fisheries exemption.

A fisheries exemption would set a poor precedent. The present language of the S. 2324 exemptions do not exempt federal programs from the consistency requirements, but exempt federal activities which can meet one of the general exemption tests. If S. 2324 were amended to categorically exclude fishery management plans, a list of federal program exemptions could be expanded through annual amendments. I am concerned that offshore oil and mining interests would be next in line if this door were opened.

State coastal zone management programs already recognize regional and national fisheries interests. In fact, state coastal zone plans are reviewed for regional and national interests before they are approved by the Secretary of Commerce. Extensive federal agency, state agency, interest group, and public review is required for

secretarial approval. The Secretary of Commerce also approves and carries out the provisions of the regional councils' fishery management plans. In the words of NOAA Administrator's Letter 37, "The Coastal Zone Management Act and the Magnuson Act are fundamentally compatible." The Secretary of Commerce would not approve a state coastal zone management plan which contained a policy designed to steal fish from a neighboring state or to frustrate the administration of the Magnuson Act.

Oregon's coastal zone management program is one of a few state programs which contain federally approved, enforceable, fisheries policies. These policies are designed to protect the long-term productivity of our fisheries. Anadromous fisheries are given special attention. Oregon's coastal program includes policies designed to protect the natural resources of the territorial sea, estuaries, riparian habitats, and watersheds. It also contains a fisheries enhancement program designed to restore depressed fisheries. It makes little sense for Oregon to spend state funds to protect and restore these resources, and then not have adult salmon return from the federal fisheries conservation zone to either spawn naturally or to supply eggs for our state fish hatcheries. Of course, Oregon's coastal zone management program cannot be used to ensure that Oregon-reared salmon are caught only by Oregon fishermen, but it has been used to ensure that the Pacific Fishery Management Council includes adequate natural spawning escapement goals within its salmon management plans. The very presence of the federal consistency requirements encourages coordination between state and federal fishery managers. As a result of this coordination, my agency has always found the Pacific Council's plans consistent with the Oregon Coastal Management Program.

My last point is that any apparent conflict between the Coastal Zone Management Act and the Magnuson Act should be carefully examined. The State of Florida has a suit against the Secretary of Commerce; this suit alleges both violation of the Magnuson Act standards and inconsistency with the Florida Coastal Management Program. The suit arose because a regional fisheries association desired the use of purse seines for the capture of mackerel. Florida prohibited this method, and the association was unsuccessful in convincing the South Atlantic Fishery Management Council to allow purse seines. They were, however, successful in convincing the Secretary of Commerce to reverse the decision of the South Atlantic Council. Florida had a strong case, so they sued the Secretary. Most observers are convinced that the Florida allegation of inconsistency will prevail if S. 2324 becomes law. That is why a fisheries exemption is being sought. A regional fisheries group has successfully promoted its local interests into a proposed exemption to federal legislation. The facts speak against the exemption; this local dispute does not warrant a legislative remedy.

I thank you for this opportunity to testify.

The CHAIRMAN. Let me pose one question to you on the fisheries issue which has been raised. One of the management councils reaches a decision which in theory is supposed to be good for the area that the entire management council governs. Then one State, deciding it does not like the management council's decision, says that is inconsistent with our Coastal Zone Act.

Is that a justified fear?

Mr. Ross. With the States that I am familiar with, no, it is not. There are, first of all, only a very small handful of coastal zone management programs that contain federally approved, enforceable fisheries policies. It would only be in those States that do have those enforceable policies where that concern could arise.

We have not seen that happening. I am not totally familiar with Florida's situation, but I am with a number of other States.

The CHAIRMAN. Let me ask the attorney general this question. General, it has been 15 years since I have practiced law, and I did not have an extensive public law practice when I practiced. I have read the Supreme Court's decision in this matter.

You heard the testimony of the administration witnesses that really under the Outer Continental Shelf Lands Act or the Envi-

ronmental Policy Act really the State's interest can be taken care of one way or the other, or will be observed.

If the Coastal Zone Management Act is not amended as this bill amends it, or something very similar to it, do you as the principal law enforcement officer see that you have any other power—I do not mean persuasion, I mean power—to make the Federal Government act in consistency with your Coastal Zone Act?

Mr. VAN DE KAMP. No. We still retain some power at the time of planning and exploration and further on down the line, but I think it has been amply demonstrated that it is only at the time of lease sales that you can really do the kinds of studies that are required. And, frankly, I think the oil companies should be here championing this program because it is in their best interest to know going in, before they put in hundreds of millions of dollars, what they are going to get and what the rules of the ball game will be.

The CHAIRMAN. Of course, you know what the argument would be. You have some money up front involved in the leasing and you come in and say we have got this money involved, you cannot stop now. The answer is you could not stop them now; you have to wait until they put several million or more dollars into it, put the money up to get the right to drill.

I would think that everybody—oil companies, you, the Federal Government—would like to have that decision determined at the start and not midway along the process.

Mr. VAN DE KAMP. That is absolutely right. The train is on the tracks. The law of inertia applies. There have been very few drilling operations stopped, certainly down the line.

I would just like to refer to the fact that our coastal commission has provided in a letter to you dated March 23, the history of our California litigation, the recent lease sales. A couple of things stick out in that letter.

First of all, while we have been involved in litigation over some of these tracts the coastal commission has agreed, has agreed with the Interior Department on the appropriateness of leasing nearly two-thirds of the OCS tracts under the Department's plans.

We have not always had strictly an adversarial attitude, but at the same time we have won in court, certainly in lower courts, a number of preliminary injunctions before we got to the Supreme Court decision on January 11 which indicated that the rights of the States, the interests of our States, have been amply demonstrated, or at least to District Court judges, and to the Ninth Circuit Court of Appeals—impartial arbiters, mind you, trying to judge the difference between the State's position and the Federal Government. I blanch a bit when I hear this argument that we have a veto power, the fact of the matter is we love to persuade a court.

Practically speaking, most situations things do get resolved. Then, third, if you pass this legislation you will have exceptions that I think take care of the Federal interest.

The CHAIRMAN. I think the interesting thing is this case involves California. Of all the States in the Union over the years who have been very generous in allowing activities off the coastline, California is probably paramount or at least equal to Louisiana and Texas. It is not as if California has a history of no, no, no to development off their coast.

I see no likelihood that for some reason California is just going to turn their back on what has been their history and say we are now changing our total position, unless the Federal Government jams it down our throat.

Mr. VAN DE KAMP. I think that is correct. There is only one lease sale—that is, lease sale 73—where the State tried to stop the entire process. Usually it has been targeting in on specific tracts that we thought were simply inconsistent.

The CHAIRMAN. Gentlemen, I have no more questions. Thank you very much. It is a good panel. I appreciate it. General, I will see you again.

We will now move on to a panel of E. Edward Bruce and Philip J. Burguieres, president and chief operating officer of Cameron Iron Works of Houston.

Mr. Bruce, do you want to go first?

STATEMENTS OF E. EDWARD BRUCE, ON BEHALF OF THE ALASKA OIL & GAS ASSOCIATION, THE AMERICAN PETROLEUM INSTITUTE, AND THE WESTERN OIL & GAS ASSOCIATION; AND PHILIP J. BURGUIERES, PRESIDENT, CAMERON IRON WORKS, INC., ON BEHALF OF THE NATIONAL OCEAN INDUSTRIES ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS

Mr. BRUCE. Thank you, Mr. Chairman. My name is Edward Bruce, and I represent in these hearings the Alaska Oil & Gas Association, the American Petroleum Institute, and the Western Oil & Gas Association.

My clients oppose S. 2324 because we believe it will expand the power of States over OCS leasing in a fashion that may well retard OCS development and is certain to bring about delaying litigation. Moreover, this disruption is not necessary to give the States a consultative role, to provide environmental protection to their coastal zone, or even to protect the integrity of their CZMA programs.

Proponents of the bill have argued that it is necessary to give the States a consultative role, but in fact section 307(c)(1) is not a consultative statute. It instead is a command that Federal activities directly affecting the coastal zone shall to the maximum extent practicable be conducted consistent with those programs.

Without question, passage of S. 2324 would be seized upon by the States as a grant of authority over OCS leasing. It would be invoked by some of them to bar such activity off their coasts. Indeed, as is fully described in my written statement, both California and Massachusetts have already interpreted the existing statute as giving State CZMA agencies final decision authority over leasing.

Confirming in any measure such claims would lead to disruption of the OCS leasing program. This is so for two reasons. First, vesting decisional authority in coastal States over leasing would lead to the striking of a balance that is likely to understate the benefits of leasing and overstate its costs.

This is so because the benefits of leasing are national in scope. They accrue to all Federal taxpayers in the form of payments into the Treasury and they accrue to consumers throughout the land in the form of secure supplies of oil and gas.

On the other hand, coastal States tend to view the costs of leasing from a local perspective. When I say this I do not rely just on abstract theory but, rather, on past concrete cases, such as a recent one involving California, where after extensive consultation with the Governor the Department of the Interior worked out a plan that was acceptable to the Governor and he said formally in a memorandum of agreement that it was in the best interests of the California citizens.

Nonetheless the coastal commission, an independent agency of that State, voted 8-to-4 to condemn the entire lease sale and took the Department of the Interior to court on the matter.

The second point we have is that passage of S. 2324 will be certain to result in additional litigation at the leasing stage where courts will be required to resolve consistency disputes without any guidance from the statute or from CZMA programs themselves. Prior to the Supreme Court's decision, there were 10 law suits over the consistency issue at the leasing stage.

Every single OCS sale off California since 1974 has resulted in a law suit brought by the State—every single one. If this amendment is passed it is clear that many other law suits will be filed of a similar sort by California and other States.

One of the principal reasons that litigation would ensue is because the act itself gives no guidance as to the measure of authority the States have as against the Federal Government and because the programs themselves, as Mr. Bettenberg I think so clearly pointed out, are absolutely without standards. No one can look at them and make predictions about how they will apply to a given leasing proposal.

You ask, Mr. Chairman, where could the States go if this amendment is not passed? What can they do in court in order to make sure that their CZMA concerns are considered by the Department of the Interior or other Federal officers? I suggest to you that they have a very clear remedy under the Administrative Procedure Act.

The Secretary of Interior and every other Federal official is required to consider all relevant matters bearing upon their actions. If he does not consider a CZMA program brought to his attention by a State officer, There is a remedy in court under that statute to make sure that he does consider it.

The CHAIRMAN. But not follow it.

Mr. BRUCE. He must consider it; that is correct. He is not obliged to follow it, but he must consider it and consult with respect to it.

The full range of environmental statutes remains applicable to the coastal zone—the National Environmental Policy Act, the Clean Water Act, the Endangered Species Act, and a host of other Federal legislation that have successfully protected the environment of the coast over the past 10 years and more.

Finally, State CZMA programs remain applicable at the exploration and development stages of an OCS project, which are the very first ones that can give rise to any impacts on the coastal zone itself.

Thank you, Mr. Chairman, for this opportunity to testify on behalf of my clients. I will be happy to answer any of your questions or to supply any additional material for the record.

[The statement follows:]

STATEMENT OF E. EDWARD BRUCE, ON BEHALF OF THE AMERICAN PETROLEUM INSTITUTE, WESTERN OIL & GAS ASSOCIATION

Mr. Chairman and members of the Subcommittee, my name is E. Edward Bruce. I am an attorney with the law firm of Covington & Burlington in Washington, D.C., and appear on behalf of the American Petroleum Institute (API) and the Western Oil & Gas Association (WOGA) to oppose S. 2324, a proposed amendment to Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(1). API and WOGA oppose the enactment of this bill for the following reasons:

First, in overturning the Supreme Court's decision in *Secretary of the Interior* v. *California*, 104 S. Ct. 656 (1984), the bill would extend to the States some undefined measure of control over Outer Continental Shelf (OCS) leasing in derogation of long-standing federal rights. This transfer of control would retard OCS energy development at a time when there is a critical need to find new domestic sources of oil and gas.

Second, the amendment is certain to breed litigation over OCS leasing. This is true because neither the CZMA, nor anything contained in these amendments, nor CZMA programs provide judicial or administrative standards by which to measure the extent of the authority being granted to the States.

Third, the amendments are not necessary to assure consultation between the federal government and the States with respect to OCS leasing. In fact, the amendment would frustrate the consultative procedures which are already in place. These procedures have been successfully utilized to assure an appropriate balance of federal and State interests in OCS leasing.

Finally, the amendments are not necessary either to assure adequate environmental protection of the coastal zone or to protect the integrity of CZMA programs. The former is fully provided for by numerous existing federal environemntal statutes, as well as the Outer Continental Shelf Lands Act (OCSLA); the latter is assured by the application of State CZMA programs to the exploration and development/production stages of OCS projects.

THE AMENDMENT WOULD GRANT AN UNDEFINED MEASURE OF CONTROL OVER OCS LEASING TO THE STATES AND THEREBY DISSERVE THE NATIONAL INTEREST

Section 307(c)(1) is not a consultative statute. It is a command that federal activities directly affecting the coastal zone "shall" be conducted in a manner that is "consistent to the maximum extent practicable" with State CZMA programs.

Thus, what States wish to achieve through the proposed amendment to the CZMA is substantive authority over leasing itself. The grant of such authority to the States is wrong whether considered from the perspective of past history or the current national interest.

1. The Amendment to Section 307(c)(1) Ignores Long-Established Federal Interests in OCS Leasing.—While the CZMA represented an innovative step in federal-state land use planning, Congress in enacting the CZMA in 1972 did not write on a blank slate. Instead, Congress acted against the background of the several Supreme Court "Tidelands Oil" opinions asserting federal supremacy over all submerged lands [1] and the later "1953 Compromise" by which Congress passed legislation granting coastal States ownership of submerged lands within three miles (or in two instances three leagues) of their coast, 43 U.S.C. §§ 1301(a), 1311(a), but reserved for the federal government exclusive proprietary control ove rthe soil and seabed of the OCS outside this zone, 43 U.S.C. §§ 1302, 1332(a).

While CZMA § 307 gave States leverage over federal activities, its passage did not disturb the essential balance of power between the federal government and the States as to the OCS. Congress defined the seaward limits of the "coastal zone" as being coterminous with that portion of the submerged lands over which States were given proprietary control by the 1953 Compromise. CZMA §§ 304(a)&(b), 16 U.S.C. § 1453(a)&(b). Moreover, Congress insisted in 1972 that "nothing" contained in the CZMA "shall be construed . . . to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, *submerged lands*, or navigable waters. . . ." CZMA § 307(e)(1), 16 U.S.C. § 1456(e)(1) (emphasis added). In the light of those provisions and the Act's legislative history,[2] the Supreme Court in *Secretary of the Interior* v. *California* felt "im-

[1] *United States* v. *California*, 332 U.S. 19 (1947); *United States* v. *Louisiana*, 339 U.s. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950).

[2] The sponsors of the 1972 CZMA successfully opposed all amendments extending the CZMA "beyond any territorial sea . . . into what we call a contiguous zone from the three-mile limit to

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pelled to conclude that the 1972 Congress did not intend § 307(c)(1) to reach OCS lease sales." 104 S. Ct. at 666 [3]

S. 2324 would change all of this. It would ignore the principles articulated by the Supreme Court in the *Tidelands Oil Cases*. It would undo the terms of the 1953 Compromise. Most significantly, it would not only overturn the recent Supreme Court decision but also it would extend the CZMA past the limits described in 1972 by allowing States to apply their CZMA programs to OCS leasing.

2. Vesting Control Over OCS Leasing in the States Would Disserve the National Interest.—The benefits derived by the United States from OCS mineral leasing activities are national in scope. The federal Treasury receives the large cash bonuses paid by bidders at lease sales, and similarly enjoys the sizeable royalties that accrue where commerical quantities of OCS oil and gas are discovered and ultimately produced. The OCS has so far produced more than six billion barrels of crude oil and more than 58 trillion cubic feet of natural gas. The federal government has received more than $59 billion in direct revenues from OCS leasing, production and rentals.

Oil or gas that is found offshore is widely distributed to industrial, commercial, residential, and individual consumers across the land. Thus, residents of our landlocked States, both as federal taxpayers and as consumers, have as great an interest in the production of OCS oil and gas as those located in our coastal States.

Technological advances and rigorous regulatory controls enforced by the federal government have very substantially reduced the environmental impacts associated with OCS oil and gas activities. For example, since 1970 over four billion barrels of OCS oil have been produced with no major oil spills. Nevertheless, coastal States adjacent to frontier OCS leasing areas continue to display anxiety about such activities.

Thus, vesting decisional authority in coastal States with respect to OCS leasing would often lead, particularly in frontier regions, to the striking of a balance between national and State interests, quite different from the one that would be struck by a federal officer who has a broader perspective on the issues—i.e., who must take into account the national benefits of leasing as against its localized impacts.

In short, vesting any measure of authority in the States with respect to leasing on federal OCS lands will, in all likelihood, retard the development of at least some of those lands. Such action would fly in the face of the stark findings made by Congress, just five years ago, when it declared that the United States was in increasing peril because of its dependence upon uncertain foreign oil supplies and thus adopted the policies and procedures of the 1978 OCS Lands Act to permit "expedited exploration and development of the [OCS] in order to achieve national economic and energy policy goals, ensure national security, reduce dependence on foreign resources, and maintain a favorable balance of payments in world trade." 43 U.S.C. § 1802(1).

The events of the ensuing five years have not lessened the validity of these findings and policy declarations. To the contrary, the United States is as dependent today upon foreign sources of oil as it was in 1973 when we suffered the first Arab oil boycott, and the nations who export those resources are, if anything, less stable today than they were five years ago.

THE AMENDMENT TO SECTION 307(C)(1) WILL FOMENT LITIGATION

Far from avoiding litigation, the adoption of the proposed amendment will give rise to additional litigation over the OCS program. Two recent examples bear this out.

For OCS Sale No. 73 (Offshore Central California), the Secretary of the Interior entered into consultation with California's Governor pursuant to Section 19 of the OCS Lands Act (OCSLA), 43 U.S.C. § 1345. The Governor recommended that Interior delete some of the tracts nearest to shore in order to protect beaches, estuaries, and

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the 12-mile limit." 118 Cong. Rec. 14184 (remarks of Senator Hollings). The House bill had proposed a federally prepared and administered program for this "contiguous zone," thus similarly recognizing that extending State-administered CZMA programs beyond the three-mile limit would violate the terms of the 1953 Compromise. H.R. Rep. No. 92-1049, p. 7 (1972). However, even this proposal to assert further federal control over these federal waters was stricken from the bill in conference, since it "would create potential conflicts with legislation already in existence concerning Continental Shelf resources"—*i.e.*, the OCS Lands Act. H.R. Conf. Rep. No. 92-1544, p. 15 (1972).

[3] Four dissenting members of the Court reached a contrary conclusion. However, even they failed to uncover a single statement by any member of Congress in 1972 that the CZMA should apply to OCS leasing decisions.

other coastal resources. He also recommended that the Secretary impose lease stipulations on the remaining tracts dealing with, among other things, air quality, fishery operations, and the transport of oil by pipeline.

The result of this consultation was a Memorandum of Agreement (MOA) between California and Interior providing for the deletion of 21 near-shore tracts and the adoption of all the lease stipulations sought by California. In signing the MOA, California stated that these modifications would "accomplish the necessary balance between production of needed oil and gas and protection of our valuable environmental resources." [4]

Notwithstanding the fact that Interior met, in full, California's demands as recited in the Section 19 process, the California Coastal Commission (CCC), the independent agency which administers California's CZMA program, subsequently voted 8–4 that the leasing of any tracts in the Sale No. 73 region would be inconsistent with that program. Accordingly, the CCC filed suit in November 1983 challenging Interior's compliance with the California CZMA program and seeking an injunction against the entire sale.

Just seven months earlier, there was a similar invocation of the CZMA by Massachusetts as to OCS Sale No. 52. There, too, the Secretary entered into consultation with the Governor under Section 19 of the OCSLA and received specific recommendations with respect to the conduct of OCS Sale No. 52—the deletion of seven tracts of high fishery value, 41 lobster-habitat tracts, and 50 tracts more than 100 miles at sea lying in deepwater as to which Massachusetts had concerns about the safety of existing technology. The Secretary deleted all seven of the fishery tacts, 34 of the 41 lobster-habitat tracts, and failed to comply only with the recommendation as to the deletion of 50 deep-water tracts, concluding that industry's technology, which was already in use in other parts of the OCS, was adequate for operations in that region. Nonetheless, Massachusetts sued under the CZMA and other legal theories to enjoin the entire sale.

The recent California and Massachusetts cases have a number of elements in common.

First, in both States, as in many others, it is possible either for the coastal planning agency to use in its own name without the Governor's approval, for the State's Attorney General to bring a lawsuit under the CZMA without the support of the Governor, or for local governments to use where the State does not. Therefore, vesting authority over federal OCS leasing activity with governors does not assure that other State or local agencies or public interest groups will not sue.

Second, in both cases CZMA claims were made to seek invalidation of an entire lease sale even though the Secretary of the Interior had complied in full or very substantial measure with the Governor's recommendations concerning the sale.

Third, there were no provisions in either the California or Massachusetts CZMA programs giving any indication that those States would oppose OCS leasing, nor were any standards recited against which to measure a lease sale's consistency with the programs.

Fourth, although the Department's regulations instruct States that they "should list in their management programs Federal activities which . . . are likely to directly affect the coastal zone," 15 C.F.R. § 930.35(c), neither California nor Massachusetts so listed OCS leasing when their management plans were submitted for federal approval.

Finally, in both the California and Massachusetts cases, courts were asked to decide, without any guidance, the question of Interior's compliance with the State programs. Instead, the courts had before them merely the States' assertions that their programs barred leasing and the contrary contentions of the Secretary of the Interior that the State programs permitted leasing.

The lack of CZMA program standards bearing on OCS leasing and the lack of defined procedures for the resolution of CZMA disputes under Section 307(c)(1) invite anyone with appropriate authority in a State CZMA agency, an Attorney General's office or the myriad local governments potentially affected by an OCS sale to challenge OCS leasing under the CZMA. This is documented not only by the California and Massachusetts cases, but also by the many similar suits filed prior to the Supreme Court's decision: One additional California case and others filed by New York, New Jersey, Maryland, North Carolina, and several Alaska local governents.[5]

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[4] Letter from G. W. Duffy, Secretary of Environmental Affairs, to James Watt, Secretary of the Interior, dated October 6, 1983.

[5] *California* v. *Watt*, E.R.C. 1711 (C.D. Cal.) (June 11, 1982) (Sale No. 68); *Kean* v. *Watt*, No. 82-2420 (D.N.J. 1982), *appeal pending*, No. 82- (3d Cir.) (Sale No. RS-2); *North Carolina* v. *Watt*,

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The Supreme Court's decision that Section 307(c)(1) does not apply to OCS leasing has eliminated this source of litigation. The New York, New Jersey, Maryland, North Carolina and California cases have either been or are about to be mooted or settled. Indeed, for the first time since 1974 there will be no pending litigation between the State of California and the Department of the Interior with respect to OCS leasing. Massachusetts is presently the only State pressing a leasing case against Interior, and that case too may soon be dismissed as moot. Had the Supreme Court reached a contrary conclusion in *Secretary of the Interior* v. *California*, however, there would doubtless have been a continuation of litigation in California and elsewhere against OCS leasing.

AMENDMENT OF SECTION 307(C)(1) WILL FRUSTRATE EXISTING CONSULATION PROCEDURES

The histories of the California and Massachusetts cases discussed above show that there is ample and effective opportunity for OCS leasing consulation without direct application of the CZMA. Under Section 19(a) of the OCSLA, 43 U.S.C. § 1345(a), both governors and representatives of local governments are entitled to make "recommendations" to the Secretary of the Interior concerning the "size, timing and location" of OCS leasing. The Secretary must accept the governor's recommendations and he may accept the recommendations of local governments, unless he determines that they do not provide for an adequate balance between the national interest and well-being of the citizens of the affected States. OCSLA § 19(c), 43 U.S.C. § 1345(c).

Movever, if he makes such a detrermination, the Secretary must communicate to the governor in writing the reasons for his decision, after an opportunity for consultation to implement alternatives that would strike a reasonable balance between these interests. Finally, OCSLA § 19(d) provides explicit procedures for judicial review of the Secretary's action upon these recommendations, making it "final" unless found to be "arbitrary or capricious."

Section 19 of the OCSLA was enacted in 1978, six years following the passage of Section 307(c)(1) of the CZMA and two years after the 1976 amendments to that statute. It was adopted at the urging of the States, which implicitly recognized that the CZMA was not a suitable vehicle for State-federal coordination with respect to OCS leasing decisions. For example, the director of the California Governor's Office of Planning and Research testified that "major changes . . . in federal law" were necessasry to give the States an adequate "voice" in OCS leasing decisions.[6] On this basis, he urged the adoption of Section 19 of the OCSLA to fill a gap which California perceived in existing federal law (which, of course, then included the CZMA):

"It is for situations like these—where there is a clearly identifiable state interest—that we see the need for a process which would allow the Governor to negatively nominate tracts and have that decision accepted by the Interior's Secretary unless he makes specific national interest findings to justify a contrary conclusion."[7]

California's position with respect to the need for Section 19 was echoed by Alaska and Massachusetts.[8]

On the basis of this testimony from the States, Congress adopted Section 19 of the OCSLA "[to] ensure that the Secretary gives thorough consideration to the voices of responsible regional and local State officials in planning OCS leasing and development.[9]

However, Congress made clear that it was adopting the specific procedures of Section 19 which give "final" authority to the Secretary of the Interior because it "did not believe that any State should have a veto power over OCS oil and gas activities." [10]

No. 81-472-Civ-5 (EDNC) (Sale No. 56); *North Slope Borough* v. *Watt*, No. A82-421 (D. Alaska), *appeal pending*, No. 84- (9th Cir.) (Sale BF); *New York* v. *Watt, No. 83 Civ. 1523 (EDNY) (Sale No. 76); Maryland* v. *Watt*, No. 83-1180 (DDC) (Sale No. 76); *Village of False Pass* v. *Watt*, 565 F. Supp. 1123, 1131 n.2 (D. Alaska 1983), *aff'd on other grounds*, No. 83-3989 (9th Cir. Mar. 12, 1983) (Sale No. 70).

[6] Hearings on S. 9 before the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. 575 (1977).

[7] *Id.* at 584.

[8] *Id.* at 514 (statement of Robert LaResche, Alaska Commissioner of Natural Resources); Hearings on H.R. 1614 before the House Ad Hoc Select Com. on the OCS, 95th Cong., 1st Sess. 671-72 (1977) (statement of Evelyn F. Murphy, Massachusetts Secretary of Environmental Affairs).

[9] S. Rep. No. 284, 95th Cong., 1st Sess. 78 (1977).

[10] *Id.*

As Congressman Murphy explained on the floor of the House of Representatives: "The conference report [through OCSLA § 19] would open Interior's decisionmaking process so that relevant outsiders—and in particular, State governments and through States, local government—may present their views and must be heard. They would not have a veto—only an opportunity to present their views and assurances that those views will be considered."[11]

In the past, States have forwarded their CZMA-based policy concerns as to OCS leasing to the governors for inclusion in the Section 19 recommendations to the Secretary of the Interior. Following the Supreme Court's decision, they doubtless will still do so and the Secretary is legally bound to consider them.[12] Thus, States who wish to have their CZMA programs considered during the OCS leasing process may still so so.[13]

An amendment to Section 307(c)(1) is thus not only unnecessary to achieve consultation, but actually it can frustrate the consultative mechanism that Congress has established for State input into the OCS process. As the Sale No. 73 dispute with the CCC vividly illustrates, arming a State agency with CZMA authority can lead to the frustration of the arrangements worked out between a State governor and the Secretary of the Interior pursuant to Section 19. Indeed, since the lower courts have held that local governments and environmental groups have standing to sue under Section 307(c)(1) of the CZMA,[14] even where all elements of the State government are in accord with respect to an OCS lease sale, others may invoke it to disrupt the sale.

AN AMENDMENT TO SECTION 307(C)(1) IS NOT NECESSARY FOR ENVIRONMENTAL PROTECTION OF THE COASTAL ZONES

Notwithstanding the Supreme Court's ruling that the CZMA does not apply to OCS lease sales, there is a full range of other rigorous federal environmental laws, such as the National Environmental Policy Act, the Endangered Species Act, and the Clean Water Act, which apply to both State coastal waters and to activities on the federal OCS. Thus OCS activities must meet these standards that Congress has defined and 74 sets of federal regulations in achieving and appropriate balance between industrial activity and environmental protection.

Moreover, the OCSLA itself recites protection of the environment as among its principal purposes[15] The Act is, therefore, embedded with provisions requiring the most careful attention to environmental concerns.[16]

AN AMENDMENT TO SECTION 307(C)(1) IS NOT NECESSARY TO PROTECT THE INTEGRITY OF CZMA PROGRAMS

Throughout the litigation that culminated in the Supreme Court's opinion and in the many other CZMA suits filed prior to that opinion, the States have never identified and physical activity which takes place at the time of OCS leasing itself that could have an impact upon their coastal zones. Instead, the States' arguments for applying Section 307(c)(1) to control OCS leasing all turn upon environmental impacts that might occur at later stages of an OCS project, principally after exploration discovers commercial quantities of oil and plans for production and development are approved. However, prior to the approval of both exploration and production/development plans, the States will have a full opportunity to invoke Section 307(c)(3)(B) of the CZMA to ensure that any activities contemplated by those plans, which may affect land or water uses within the coastal zone, are consistent with State CZMA programs.

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[11] 124 Cong. Rec. 26778 (August 17, 1978).

[12] *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 414, (1971).

[13] NEPA provides another means of consultation for the States. In the scoping process that precedes preparation of an environmental impact statement (EIS), State and local governments are given a voice in the topics to be covered by the EIS. Subsequently, they are invited to provide detailed comments on the draft EIS. Typically, every agency of a State government whose mission is in any way affected by an OCS project makes its views known as to policy and environmental aspects of the project. Thereafter, Interior is obliged by NEPA to respond to all pertinent comments. In doing so, it often modifies the conclusions reached in the draft EIS, and always brings the most pertinent of the State's comments to the Secretary's attention through decisional memoranda. As with the Section 19 OCSLA process, State CZMA programs are commonly referred to in the NEPA process.

[14] *California* v. *Watt*, 683 F.2d 1253, 1269-71 (9th Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 656 (1984).

[15] *See, e.g.*, 43 U.S.C. §§ 1802(2), (3), (7).

[16] See, e.g., 43 U.S.C. §§ 1334(a)(2)(A), 1334(a)(2) & (3), 1346 & 1351(h)(1)(D).

The procedures that must be followed in achieving consistency at the exploration or development/production stages are clear: Initially, an OCS lessee submitting a plan of exploration for approval or later a plan of development and production must certify to a State CZMA agency that its activities, insofar as they affect land or water uses in the coastal zone, will be conducted in a manner consistent with the State program. Then, the State is empowered either to agree or disagree with the certification and, if it disagrees, to suggest alternative means by which consistency can be achieved. Finally, should the State decide that the operations are not consistent and cannot be made so, the lessee is entitled to appeal to the Secretary of Commerce, who can overrule the State's decision only if he determines either that the proposed activities are consistent with the objectives or policies of the CZMA or that they are necessary in the interests of national security.

In 1972 when the CZMA was enacted, Congress had not previously "provide[d] for the problems that States began to anticipate in connection with increased energy-related activities in the coastal zone;" the 1972 CZMA gave the States "no part in any decision concerning development on the [OCS]. . . ."[17] The 1976 amendments to the CZMA addressed this issue, and revised Section 307(c)(3) to make it apply explicitly to the exploration and production/development plans submitted by OCS lesses. In doing so, the Conference Committee rejected the proposal to insert the word "lease" into Section 307(c)(3) and instead stated that it was applying "the consistency requirement to the basic steps in the OCS leasing process—namely, the exploration, development and production plans submitted to the Secretary of the Interior."[18]

The Conference Report went on to state that "this provision will satisfy State needs for complete information, on a timely basis, about the details of the oil industry offshore plans."[19]

Accordingly, State CZMA programs will be fully applicable to OCS projects before those projects can result in any physical impacts affecting the coastal zone. The proposed amendment to Section 307(c)(1) is not, therefore, necessary to protect the integrity of CZMA planning.

ANALYSIS OF SPECIFIC PROVISIONS OF S. 2324

Although described as necessary to reverse the Supreme Court's decision that Section 307(c)(1) is not applicable to OSC leasing. S. 2324 would also change the law in other significant respects and overrule two decisions of lower federal courts that have previously interpreted Section 307(c)(1): First, it would expand Section 307(c)(1) to require consistency if a federal activity is likely to result in "social or economic consequences in the coastal zone," not merely "Physical or biological" consequences. Second, it would excuse full consistency only when the activity is (i) undertaken to counter the immediate effects of a declared national emergency; (ii) necessary for reasons of national security; or (iii) required by any provision of a Federal law which prevents consistency with any provision of an approved State coastal zone management program. Moreover, activities thus excused must still be consistent "to the maximum extent possible" with State programs.

S. 2324 cannot therefore be justified as merely a measure designed to overturn the Supreme Court's holding in *Secretary of the Interior* v. *California*. Instead, it embodies a more expansive application of consistency review than has ever been sanctioned by any court.

Although API and WOGA take the position that no amendment to Section 307(c)(1) is justified, we also present our views as to the implications of the specific amendments that are proposed in the bill.

Initiates a chain of events

The bill would specifically define the phrase "directly affects the coastal zone" to exend to any federal activity that "initiates a chain of events likely to result in" certain defined consequences in the coastal zone. In this respect, the bill overrules the Supreme Court's holding that impacts on the coastal zone, which cannot occur until after further federal approval and CZMA scrutiny of the exploration or development/ stages of an OCS project, are not direct effects of leasing itself. 104 S. Ct. at 672.

The "chain of events" approach to defining "directly affecting" robs the word "directly" of any meaning whatever. Under conventional dictionary definitions of that

[17] H. R. Rep. No. 1212, 96 Cong., 2d Sess. 26-27 (1980).
[18] S. Conf. Rep. No. 987, 94th Cong., 2d Sess. 30 (1976).
[19] *Id.*

term, "directly" means "simultaneously," "without any intervening agency or instrumentality of a determining influence," "without any intermediate step, without a moment's delay; at once, immediately."[20] Moreover, the most nearly analogous regulatory definition of the phrase, as set forth under the National Environmental Policy Act, recites that "direct effects" are those which are "caused by the action and occur at the same time and place," whereas "indirect effects" are those which "are later in time or farther removed in distance, but are still reasonably foreseeable.[21] Accordingly, the "chain of events" definition cannot be defended as carrying out the original meaning of the phrase "directly affecting."

Additionally, the use of the "chain of events" definition extends the application of CZMA programs to such a broad range of federal activities that is impossible to ascertain the scope of the statute, particularly when coupled merely to "social and economic" impacts upon any of the tens of millions of people who inhabit or work in the coastal zone. Assuming that the "chain of events" metaphor is meant to reach OCS leasing, even though States are concerned solely with the impacts of OCS projects that may rise at the later exploration or development/production stages, then a "chain of events" must extend to a wide range of other federal actions—e.g., the adoption of air quality standards by EPA which would change the nature of industrial operations permitted by factories located in the coastal zone; the promulgation of banking regulations that would have an impact on the New York, Chicago and San Francisco financial markets; the conduct of foreign policy or the making of military decisions which may result in ship or troop movements in the coastal zone.

Thus, if the bill is passed in its present form, a virtually limitness array of federal activities will have to be analyzed for their consistency with State programs. On the other hand, restricting review to those activities that "directly affect" the coastal zone within the conventional meaning of those terms—i.e., result in immediate, certain, and clearly definable impacts—would keep the statute within manageable and predictable limits.

Socio-economic impacts

As noted, S. 2324 would link the "chain of events" definition of directly affecting to social and economic, not merely physical or biological impacts in the coastal zone. One court, although agreeing that lease sales directly affect the coastal zone, squarely rejected the argument that any social or economic impacts which they might cause in the coastal zone justified CZMA scrutiny. *Kean* v. *Watt,* No. 82-2420 (D. N.J. 1982) *On appeal,* No. 82-5679 (3d Cir.). The court's reasoning in rejecting the extension of the CZMA to socio-economic impacts is most instructive here:

"The consequences of adopting New Jersey's construction of the Act [as extending to social and economic impacts] would be an extraordinary extension of the Act's reach. If each Federal action affecting an industry conducted within the coastal zone were to be subjected to a consistency determination and had to be accomplished in a way which is, to the maximum extent practicable, consistent with the State management program, all manner of Federal actions, not just those on the [OCS], would be subject to the Act's rather severe inhibitions on Federal activities." (Slip Op. 42).[22]

Thus, this amendment would convert a statute which, by name and by design, is intended to deal with the management of the coastal zone into legislation whereby States are allowed to make significant management decisions with respect to virtually all federal activities, since nearly every federal regulation or action has some impacts on the tens of millions of people who reside or work in the coastal zone.[23]

The district court in *Kean* based its refusal to construe the CZMA as extending to social and economic impacts on the basis of its reading of the Act as being "designed to afford . . . protection of the coastal zone's nature resources such as wetlands, flood plains, [and the like]," not the economic health of its citizens or industries.

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[20] Webster's New International Dictionary (unabridged 3d ed. 1971).

[21] 40 C.F.R. § 1508.8.

[22] In *Conservation Law Foundation* v. *Watt,* 560 F. Supp. 561, 574-75 (D. Mass.), *aff'd on other grounds,* 716 F.2d 946 (1st Cir. 1983), the district court expressed its disagreement with the analysis of the social and economic impacts issue in *Kean,* v. *Watt.* However, even that opinion, which stresses the range of coastal impacts that would have to be surveyed if socio-economic affects are considered—housing and school shortages, employee losses in coastal industries, and the like—underscores the validity of the recognition in *Kean* that analysis of socio-economic issues would give the CZMA almost unimaginable scope.

[23] All or a part of the cities of Boston, Providence, New York, Buffalo, Cleveland, Toledo, Detroit, Chicago, Milwaukee, Philadelphia, Camden, Baltimore, Norfolk, Charleston (SC), Savannah, Jacksonville, Miami, Tampa-St. Petersburg, Mobile, New Orleans, Houston, Los Angeles, San Francisco, Portland, Seattle, and Anchorage lie on or adjacent to the coast.

(Slip Op. at 40-41). Plainly the court was correct in this regard. The CZMA defines the term "coastal zone" in geographic, not economic terms—e.g., "coastal waters," "adjacent shorelands," "transitional and intertidal areas, salt marshes, wetlands, and beaches." CZMA § 302(a), 16 U.S.C. § 1453(a). Similarly the Act requires that a CZMA program must describe physical characteristics—"boundaries of the coastal zone;" "permissible land and water uses within a coastal zone;" "inventory and designation of areas of particular concern with a coastal zone;" "identification of the means by which the State proposes to exert control over the land and water uses"—not the economic health of coastal zone-dependent industries. CZMA § 303(b), 16 U.S.C. 1454(b).

Maximum extent practicable

The final change in existing law which would be made by the bill is a statutory definition of the phrase "maximum extent practicable" which is designed to remove the flexibility perceived in that term by the Ninth Circuit when it construed Section 307(c)(1) as extending to OCS leasing. *California* v. *Watt*, 683 F.2d 1253 (9th Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 656 (1984). Although that court ruled that an OCS lease sale must comply with Section 307(c)(1) of the CZMA, it coupled that ruling to a construction of the term "maximum extent practicable" that recognized that the Secretary of the Interior would have flexibility when interpreting State CZMA programs:

"The limit beyond which conformity with a State plan would not be practicable to the maximum extent cannot be precisely delineated. Such factors as the extent to which leasing, exploration, development, drilling and production would be hampered or proscribed by conformity; the reasonableness of the State plan; as well as the terms of the particular proposed lease sale must be examined." 683 F.2d at 1265.

This part of the court's ruling was central to its conclusion that OCS lease sales must be conducted in a manner that complies with Section 307(c)(1). Stressing the historically defined national interest in federal supervision of the OCS, the court held "the statute does not provide that a State's plan takes precedence when it would preclude the federal activity, or even that the federal activity must be as consistent with the plan as is *possible*. It only provides that the activity be consistency to the *maximum extent practicable*. . . . To hold otherwise on the basis of silence, or at best attenuated inferences drawn from the language of Congress, weighs too lightly the interests of the Nation against that of the State." 683 F.2d at 1264. (emphasis in original)[24]

S. 2324 would not only overrule the Supreme Court's decision and reinstate that of the Ninth Circuit with respect to the application of section 307(c)(1) to OCS lease sales, but also it would deprive the federal government of what the Ninth Circuit believed was the necessary flexibility to interpret State programs that must be coupled to an application of Section 307(c)(1) to OCS leasing in order to maintain federal proprietary control over the OCS.

The apparent intention underlying S. 2334 is to give State governments virtually conculsive decisional authority with respect to a broad range of federal activities except in those limited situations where "national emergency" or "national security" considerations permit some exemption from CZMA program requirements. There is no justification for turning over such broad decisional authority to the States with respect to the operations of the federal government.

Certainly, this ceding of federal authority cannot be supported by any contention that State CZMA programs must initially be approved by the Department of Commerce before being effective for consistency purposes. As was established in the cases judicially reviewing the Secretary's approval of the first State CZMA program:

"Congress never intended that to be approvable under § 306 a management program must provide a 'zoning map' which would inflexibly commit the state in advance of receiving specific proposals to permit particular activities in specific areas. Nor did Congress intend by using the language of 'objectives, policies and standards' to require that such programs establish such detailed criteria that private users be able to rely on them as predictive devices for determing the fate of projects without interaction [with] the relevant stage agencies . . . ."[25]

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[24] In finding such flexibility in the term "maximum extent practicable," the Ninth Circuit was acting in a manner consistent with the court's interpretation of that same phrase in Section 18(a)(3) of the OCSLA, 43 U.S.C. § 1344(a)(3). In *California* v. *Watt*, 668 F.2d 1290, 1317 (D.C. Cir. 1981), the court recognized that the "maximum extent practicable" qualification of the Secretary of the Interior's duties with respect to OCS leasing reflected the discretion that he possesses to balance non-quantifiable environmental and social costs against potential OCS oil and gas resource benefits in promulgating a five-year OCS leasing program.

[25] *American Petroleum Institute* v. *Knecht*, 456 F. Supp. at 919.

Accordingly, the Secretary of Commerce when approving State CZMA programs was not in a position to assess the way in which they could affect those federal agencies whose activities might, in a conventional sense, directly affect the coastal zone, let alone the much larger number of activities which bear the type of attenuated connection to the coastal zone described in S. 2324. Instead, CZMA programs were approved even though they did not allow prediction as to such issues. Indeed, coastal States who later invoked their CZMA powers to attempt to bar OCS leasing either failed (as in California's case) to list OCS lease sales as a federal program requiring consistency review under Section 307 (c)(1) or (as in Massachusetts' case) actually denied at the time of program approval, that they were seeking consistency authority over lease sales.[26]

Under these circumstances, if section 307A(c)(1) is to be broadened by an expansive definition of "directly affecting," Congress should simultaneously relax the consistency standard to ensure that vital federal interests will not be sacrificed to State concerns in State CZMA decision-making processes.

The CHAIRMAN. Mr. Bruce, thank you.

Mr. Burguieres.

Mr. BURGUIERES. Thank you, Senator Packwood. I am Philip Burguieres, president of Cameron Iron Works in Houston. We are a company that sells approximately $1 billion worth of equipment a year, equipment primarily for the oil and gas industry, drilling equipment, and we also manufacture parts for jet engines. We employ approximately 7,000 people.

I am mostly here representing the National Ocean Industries Association and the International Association of Drilling Contractors, and the Petroleum Equipment Suppliers Association. These three organizations represent in excess of 1,000 companies and many jobs involved in all phases of drilling and production of oil and gas in the United States.

The thrust I would like to make this morning is basically that any impediment to further drilling off-shore for oil and gas in the United States is against the interests of national security, jobs in the United States and, in a very broad way, Senator, the trade deficit.

The CHAIRMAN. Let me just ask you to be sure I understand what you are saying. You say any impediment?

Mr. BURGUIERES. Impediment. Excuse me, Senator, the impediments to off-shore drilling opening up our Outer Continental Shelf.

The CHAIRMAN. Are adverse to the national interest?

Mr. BURGUIERES. I think it is, Senator.

Currently there are requirements and legislation on the books which require impact statements to be filed before any drilling activity takes place, and further impact statements to be filed after a discovery is made and before production activity takes place.

There are 74 sets of separate State and Federal regulations on average in any particular State that an oil company or drilling contractor must adhere to before he can proceed. Now, as you know, there are numerous hearings, public comments, et cetera, that must be made before these activities can take place.

We feel there is no need to amend the Coastal Zone Management Act as it now stands. Now why is this important? As I said, Senator, the thrust of my conversation is that we do need to get on with drilling for oil and gas on the Outer Continental Shelf. One-third of

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[26] *See* Memorandum of Massachusetts in *API* v. Knecht, Civ No. 78-0623 (D.D.C. p. 9).

our oil is imported in the United States at this time, the same amount of oil we imported in 1973.

Certainly in the 1973 to 1980 era we considered this a very important situation from a national security standpoint. Our reserve base for oil in the United States has dropped in the last 10 years. We must find more oil if we are going to be independent, even to the extent we are independent now as an oil-producing country, in the year 2000.

Our reserves are depleting every year and if we do not get after finding oil and gas our oil reserves will continue to deplete to a drastic extent. Again, Senator, only 3 percent of our off-shore acreage has been leased in the United States, a very small proportion of our property as compared to countries such as the United Kingdom and Canada.

I think the story of the United Kingdom from the standpoint of drilling for oil and gas is indicative of what a country can do once it sets its mind to having its own reserve of oil. Twenty years ago, the United Kingdom imported most of its oil. Now the United Kingdom is a net exporter. It currently takes anywhere from 8 to 11 years to develop off-shore oil and gas resources, and if we do not start now we will not be where we need to be in the 1990s.

The last point I would like to touch on is the question of safety. I think the public record of the oil and gas industry as a whole has been superb in terms of the environment. We have drilled 21,000 wells off-shore since 1956. In the last 14 years, only 800 barrels of oil have been spilled, an insignificant amount, due to blowouts or any type of spillage from production platforms or drilling activities. So I think the industry again has a superb record of safety.

Thank you, Senator.

[The statement follows:]

STATEMENT OF PHILIP J. BURGUIERES, PRESIDENT, CAMERON IRON WORKS, INC.

Mr. Chairman and members of the Subcommittee, I am Philip Burguieres, President and Chief Operating Officer of Cameron Iron Works, Houston, Texas. My company is primarily engaged in the manufacture of high performance metal products which are used during the drilling for and production of oil and gas. We are also major suppliers of forgings for jet aircraft engines. We currently are geared up to annually ship approximately $1 billion in product and we employ 7,000 people.

Today I am testifying on behalf of the National Ocean Industries Association (NOIA) and the International Association of Drilling Contractors (IADC). NOIA is a trade association with approximately 450 member companies engaged in all aspects of the service and supply industries related to offshore resource development. The International Association of Drilling Contractors (IADC) is a trade association which includes more than 1,800 member companies involved in virtually every phase of onshore and offshore petroleum exploration and development.

NO NEED TO AMEND COASTAL ZONE MANAGEMENT ACT—STATES ARE ALREADY HEAVILY INVOLVED IN THE PROCESS

Mr. Chairman, we see no need to amend the Coastal Zone Management Act to make lease sales themselves subject to state consistency determinations. States have plenty of opportunities to be heard and to influence the outcome of federal decisions in the pre-sale and post-sale stages of the OCS leasing process. This is particularly true in regards to the opportunities which the Governors have under Section 19 of the OCS Lands Act. Under the same Act, lessees and operators are required to submit an exploration plan prior to commencing exploratory activities under a lease, and the Department of the Interior must act on it within thirty days from submission. However, even though the exploration plan may be approved within that time frame, no "license or permit for any activity described in detail" in such

plan may be granted where an affected state has an approved coastal zone management plan unless the consistency requirements have been met.

Also, pursuant to NEPA, an elaborate and thorough environmental impact statement (EIS) is prepared by the Interior Department before each lease sale is held complete with attendant comments and public hearings on the draft EIS. Prior to this, informal scoping sessions are held with interested parties to identify potential conflicts. Even though all this activity has been telescoped under the 1982 Five-Year Leasing Plan, it still requires eighteen months to go through all the steps required. Many people, however, do not realize—or choose to overlook—that even after a discovery is made the Interior Department must go through the EIS process a second time at least once in every frontier area before development and production begins. This provides another opportunity for the affected states and other parties to comment and participate in public hearings covering potential local impacts. During the debate on the OCS Lands Act Amendments of 1978, environmental organizations and other proponents of the Amendments said that this provision would eliminate litigation and opposition to the lease sales because it would provide yet another opportunity to balance resource potential with environmental risks after it became known from exploration drilling whether there actually was any oil or gas in the area. The principle is still valid, but critics of the program have not ceased their opposition.

In addition to the second generic EIS, prior to proceeding with development activity, a lessee or operator is required to file a development and production plan. This is not to be confused with the exploration plan I mentioned a few moments ago. If approval of the development and production plan does not require a specific environmental impact statement, any affected state (and local government) has sixty days to review and comment on the plan, and the Interior Department must act on the proposed plan within another sixty days. However, again, even though approval of the development and production plan may be conferred within the time frame allowed—no license or permit may be issued for any activity called for where an affected state has an approved coastal zone management plan unless and until consistency certification has been obtained or until the state is conclusively presumed to concur with the consistency determination.

The lengthy and elaborate consultation and coordination procedures between the states affected by OCS leasing and the Secretary of the Interior have resulted in the deletion of many tracts and the addition of lease stipulations at the request of state governors in numerous OCS sales. With both sides acting in good faith, there should be ample opportunity to resolve differences within the time frames provided in the Five-Year Plan and the planning milestones reinstituted recently by the Interior Department. Also it should always be kept in mind that, in many ways, a lease is only a license to apply for permits—up to 17 of them issued under 74 sets of state and federal regulations. Here again the states have numerous opportunities to influence OCS activities and assure protection of the coastal environment.

RECENT INTERIOR DEPARTMENT INITIATIVES

First, under the leadership of the new Secretary, William Clark, the Interior Department has revised procedures relating to OCS leasing. These revisions include adjustments to provide for fuller state and public participation in the program. we can expect more public hearings and scoping sessions, depending on the geographical area involved and particular local problems and sensitivities. Industry has been called upon to provide more comprehensive information beginning at the call for information stage so that potential conflicts can be identified earlier and tracts lacking in interest from the standpoint of resource potential can be removed from areas to be offered for lease. At the same early point in the process, the Interior Department plans to indicate how much it already knows about an area as the result of environmental studies already completed. Among other things, these revisions in the process should reduce the size of the geographical areas subject to environmental review by the states and subesequently offered for lease. On January 12, 1984, the Department restored the concept of "planning milestones" which the states depended upon so much in the past to plan their own process of review and comment on federal OCS activities. In fact, Interior has published a new tentative planning milestones schedule covering the entire five year leasing schedule through 1987.

These revisions in OCS leasing procedures are constructive and have been well received by the states and industry alike. We support them and believe they will strengthen communications among the various parties interested in OCS exploration and development.

RECENT SUPREME COURT DECISION

The Supreme Court issued its ruling in *Secretary of the Interior et al* v. *California* on January 11, 1984. In that landmark case the Court held that OCS lease sales as such are not activities "directly affecting" the coastal zone and thus need not be conducted in a manner consistent with state coastal zone management programs pursuant to Section 307(c)(1) of the federal Coastal Zone Management Act (CZMA). The Court reasoned, first, that the legislative history of the 1972 CZMA and its 1976 amendments demonstrates that congress did not intend to apply Section 307(c)(1) to any OCS activities, and, second, that the 1978 amendments to the OCS Land Act, which require prior Interior approval of OCS exploration and development/production plans, so restructured OCS leasing that it cannot now be held that the issuance of leases causes "direct" affects upon the coastal zone.

Contrary to misstatements by environmentalists and some state representatives, the Court's opinion does not lessen environmental protection of the coastal zone nor deprive the states of any role in OCS leasing. The National Environmental Policy Act (NEPA), the Endangered Species Act, and a variety of other federal environmental statutes remain fully applicable to OCS leasing. Moreover, Section 19 of the OCS Lands Act, which provides governors with the opportunity to make recommendations concerning the "size, timing and location" of OCS leasing, which Interior "shall accept unless they do not provide for a proper balance between state and national interests, gives states significant authority to influence OCS lease sales. The Court's opinion does mean, however, that states cannot invoke their CZMA programs to restrict OCS leasing under circumstances where their recommendations do not provide for an adequate balance between state and national interests. It also means that states cannot do what California recently sought to do in connection with OCS Sale No. 73—invoke CZMA programs to oppose leasing, notwithstanding the Interior Department's compliance with recommendations made by the Governor pursuant to Section 19 of the OCS Lands Act. In its most simple terms what the Court's opinion does is to deprive states of a veto authority to override Interior's decisions as to the selection of OCS tracts for leasing, and in so doing, it reaffirms that the federal government retains proprietary control over OCS lands outside the coastal zone.

Secretary Clark responded to the Supreme Court decision in a conciliatory manner. He said, "We don't see it in terms of 'victory' . . . There should be no 'winners' or 'losers' in this process." And, he immediately expressed the Department's full intention to get together earlier in consultation with the states.

THE COURTS AND A MAJORITY OF THE STATES HAVE SUPPORTED THE PROGRAM

The OCS leasing process has received important support from federal courts in addition to the Supreme Court. Six states out of 23 bordering on OCS planning areas went to court to challenge the Administration's Five-Year Leasing Plan. Their claims, along with all the claims of a dozen other plaintiffs, were dismissed by the U.S. Court of Appeals for the District of Columbia Circuit in *California* v. *Watt* decided on July 5, 1983. This decision upheld all aspects of the Administration's Five-Year Program and is important reading for every member of this Subcommittee.

What is often overlooked is the support the program has received among the rest of 23 coastal states who not only approved the original July 1982 plan, but, also today are expressing their concerns about lease sales to the Interior Department, routinely communicating with the Minerals Management Service, and negotiating tract deletions and lease stipulations in a business as usual manner. This support comes not from just the traditional energy producing states along the Gulf of Mexico, but, from states as far away as Rhode Island where the Governor has expressed support for the leasing program and opposition to leasing moratoria.

Because the Secretary must by law give consideration to the national interest, there are bound to be times when a given state feels compelled to challenge a secretarial decision further. Under the CZMA, the Secretary of Commerce is given the final say whether a particular activity covered by that statute is consistent with the objectives of the CZMA, and if not, whether it is otherwise necessary in the interest of national security. This is all part of the process provided by Congress to resolve conflicts, and it is working.

NATIONAL INTERESTS PARAMOUNT

It must be remembered that we are talking about activities on federal land where ultimately the interests of the nation are paramount. The same Ninth Circuit Court of Appeals which ruled in favor of the State of California on the question of applica-

bility of consistency to lease sales and was reversed by the Supreme Court of the United States, also held in that same case that "the statute does not provide that a state's plan takes precedence when it would preclude the federal activity, or even that the federal activity must be as consistent with the plan as is possible. It only provides that the activity be consistent to the maximum extent practicable." The Court held that final authority "must reside in the Executive Branch of the federal government subject, of course, to such judicial review as is appropriate. To hold otherwise . . . weighs too lightly the interests of the Nation against that of a state." Resolving differences between national and local interests is one of the more challenging responsibilities facing the Secretary of the Interior in these critical times for natural resource development in America. Secretary Clark said recently he believes "that the OCS program is so sound and so essential to the future of America that we need not impose it on anyone—the states or anyone else. The program clearly speaks for itself." The Secretary also said "we can work as partners—the federal, state, and local governments, the various industries and interest groups—to harvest the riches of the sea and under the sea while protecting its grandeur and life sustaining qualities." We in industry are prepared to do our part as a member of this partnership. We hope that you will reconsider before imposing changes on the CZM program and let the system work as intended by Congress. We are convinced it can work successfully.

The CHAIRMAN. Let me ask you again, Mr. Burguieres, about this impediment. You have an impediment now, even under the vestige that is left by the Supreme Court under the Coastal Zone Act, even if we have no additional legislation. Should that last vestige be eliminated because the State can be an impediment?

Mr. BURGUIERES. I think that cooperation between the States and the Federal Government is necessary. I do not believe there is any question about that. I think it is necessary in the primary States we are looking to drill off of—Alaska, California, Louisiana, Texas, other States. I do not think there is any question that there has to be a situation where those States act in concert.

I do not feel that the States should allow the possibility of veto power, any particular State, over what I consider the best interests in the Nation, and I do consider, as I have clearly stated, getting on with OCS leasing and drilling for and production of oil and gas are in the national interest.

The CHAIRMAN. To the extent the State still has power under the Coastal Zone Management Act to limit drilling—I am not talking about leases—drilling that may be inconsistent with its coastal zone plan, should that power be eliminated?

Mr. BURGUIERES. I think that the last 3 years of States working with the Federal Government, with the Department of the Interior and the coastal zone management of most States have proven that we can work with the existing system, so no, I do not think it should be eliminated.

The CHAIRMAN. As long as they are working within the existing system, why would you not want that power extended to leasing, to previous activities so that you know from the start what the situation is going to be instead of having the leases under the court decision be outside of the purview of the States but your drilling activities are subject to the purview?

Mr. BURGUIERES. My concern, Senator, and then I would like to ask Mr. Bruce to comment on this, is that new legislation would effectively give the States some power to veto drilling activities in their waters.

Mr. BRUCE. May I supplement that, Mr. Chairman?

The CHAIRMAN. Go right ahead.

Mr. BRUCE. I think the recent 73 sale case is a good example of what is at stake here and what the concerns of my clients are and the concerns of other similarly situated people are.

In that case, the State of California, looking at this transaction at the outset, at the leasing stage before anything happened, said there is going to be massive development out there. We are not ready for that. We have had too much already. There may be huge reserves discovered and they will have too much of an impact on our coastal zone.

Therefore, because we fear these things, you should not lease any of this area at all. That was their formal position. That is the position they went to court on and prevailed on in the lower courts until the Supreme Court set it aside.

When the Supreme Court did set it aside, the lease sale was in fact held and bids were open. In fact, out of over 100 tracts—I do not remember the exact number, but it was a large number, well over 100—I think something like 8 received bids, only 8.

Now we have a much better idea, a much more focused and exact idea of what really is going to happen, and I would submit that it is quite likely now—although I cannot speak for what the coastal commission is going to do—that with the defined project before them they will see that in quite a different light.

This is the foundation upon which the entire OCS Lands Act amendments of 1978 were grounded: That at the early stages of one of these projects we know very little about what its ultimate design will be. We can speculate. We can talk about what or might not happen, but we do not know, one, how many tracts will be bid upon; two, how many of those would be explored; and, three, most important of all, because the real impacts do not come until the very last stage, which is development and production, we do not know how many, if any, will be tracts upon which oil is actually discovered and produced.

In the vast majority of cases, unfortunately from my clients' perspective and, I submit, from the national interest perspective, exploration is not successful. My clients go out and explore, and often do not find oil and have to write off the project. They have learned something, the industry has learned something, the Nation has learned something—that this province is not productive. We must look elsewhere.

But what the States want to do is say we are going to force you to speculate about what might happen 10, 20 years in the future as to production, and if we think there may be a problem—if we just think there may be a problem—you cannot lease.

The CHAIRMAN. But you have no objection to the law remaining as it is where they can prohibit you from drilling if your drilling plans are inconsistent with their coastal zone management plan?

Mr. BRUCE. I would not comment on my philosophy and the philosophy of my clients as to what the law should be. We accept the law as it is written. We know what it says and what Congress intended by it. We do say this, however: As is clearly revealed in the legislative history of the 1976 amendments to the CZMA and its original 1972 enactment, when it was passed its main thrust was that we will let these projects be worked out on a case-by-case basis. Let us see where your rig is going to be and where your plat-

form is going to be. Do you want to run a pipeline ashore? If so, the State comes in and says look, do not put it here in this wetland. This is a very sensitive area. Put it someplace else, put it 50 miles up the coast.

It may be that that is a somewhat more expensive way to do it, but we adjust the project to take account of the coastal concern. That is what the States have in the C-3 process really—at exploration, production, development—and it is only *in extremis*—and to my knowledge there have not been any of these extreme situations—where the State says I am sorry, there is no way you can do it anywhere off our coast.

So the way the act works is that at the outset the project goes forward in a very general form. Then specific plans come to be made. They are announced at the exploration and production and development stages. Then the States come in and say look, make this adjustment. Do not put your rig here, move it there because there is a fishing concern; or do not put your pipeline here, put it there, because there is a wetland concern.

Fine tuning is done and adjustments are made. The act does provide, to be sure, that if you cannot make the adjustments, if for some reason you just cannot do it, OK, the project cannot be completed. That is our reading of the act, Mr. Chairman. That is what we think Congress intended.

The CHAIRMAN. I do not think I have any more questions, gentlemen. Thank you.

Mr. BRUCE. Thank you, Senator.

The CHAIRMAN. Next we will take Sarah Chasis and Elizabeth Raisbeck.

Good morning.

STATEMENTS OF SARAH CHASIS, NATURAL RESOURCES DEFENSE COUNCIL, ON BEHALF OF NRDC, THE COAST ALLIANCE, THE SIERRA CLUB, AND THE NATIONAL AUDUBON SOCIETY; AND ELIZABETH RAISBECK, LEGISLATIVE DIRECTOR, FRIENDS OF THE EARTH, ON BEHALF OF ENVIRONMENTAL POLICY INSTITUTE, AND GREENPEACE

Ms. CHASIS. Good morning, Mr. Chairman. I will start off.

The CHAIRMAN. Go right ahead.

Ms. CHASIS. My name is Sarah Chasis. I am representing today the Natural Resources Defense Council, the Coast Alliance, the Sierra Club, and the National Audubon Society. All these groups that I represent, Mr. Chairman, would like to commend you for your excellent leadership on this issue. Passage of this legislation in this session is of top priority to the environmental community. The reason for this is very simple: When Congress enacted the Coastal Zone Management Act in 1972, and when it strengthened and reauthorized it in 1980, it was recognizing the national interest in the protection of our Nation's valuable coastal resources and the need for careful management of the tremendous development pressures which threaten those resources.

Mr. Chairman, unless the Supreme Court decision which was rendered in January of this year is reversed, as this legislation would do, that system of protections for the coastal zone is in

danger of being unraveled after it has been so carefully crafted over the last 10 years. This decision exempts offshore oil leasing decisions involving the sale of millions of acres of offshore lands from the consistency requirement. But it also goes far beyond that and effectively exempts all Federal activities, as you have observed, beyond the State's coastal zone. There are many of those activities that we in the environmental community are extremely concerned about, including the opening up of the OCS to the extraction of mineral resources on Gorda Ridge, the burning of toxic wastes at sea, as has been proposed in the Gulf of Mexico, the disposal of contaminated dredge spoil, and other pollutants in the ocean.

There are at least four reasons why this legislation is absolutely crucial, in our view. The first is that unless the Supreme Court decision is overturned, one of the major incentives for States to have the coastal programs will be eliminated. As you know, the administration has attempted to remove the other principal incentive for State coastal zone management; namely, Federal funding. This decision essentially removes the other principal incentive.

Second, the decision is contrary to longstanding interpretation by NOAA of the Coastal Zone Management Act. In its regulations, NOAA made explicit that coastal zone management programs are applicable to activities beyond the coastal zone. This was the promise that was held out to the States all these years and now has been removed by the Court's decision.

Third, the decision essentially removes the only effective mechanism that presently exists for controlling or influencing the decisions the Federal Government makes which have dramatic impacts on the States' coastal zone. I think it is very interesting that all the testimony that has come forward so far against the legislation has not provided any evidence on what exists in law presently to control Federal activities other than OCS leasing.

The CHAIRMAN. This is an interesting dichotomy of testimony, of the administration saying under the EPA the Outer Continental Shelf Leasing Act, the States really pretty much get their input anyway. You do not need this amendment because things are not going to change, and they will go along as they are. Then you have the last panel coming along and saying, oh, no, we do not want the States to have that power.

You cannot have it both ways. Either one is right or one is wrong. My hunch is that neither panel is right. I do not think the administration is right. I do not see any other law that exists other than the Coastal Zone Management Act, as amended, I hope, that is going to give the States that power. Beyond that, they have got conciliation. They have got persuasion. They can plead. They do not have any power.

Ms. CHASIS. That is absolutely right. Section 19 of the OCS Lands Act, which has been frequently cited to you, in fact in most instances has not worked effectively to influence Federal offshore leasing decisions, and lease sale after lease sale, the Secretary of the Interior has rejected the State section 19 recommendations.

Finally, the fourth reason that this legislation is so crucial is that the consistency of the subsequent stages for exploration, development and production plans essentially exempts the key Federal

decision from review, and that is when the basic scope and charter of leasing is established.

The legislation that you have introduced, Mr. Chairman, in our view, is very effective in relieving the problems created by the court decision. We have in our testimony specific recommendations concerning the national security exemption which we think is in need of tightening. We also would like to strongly recommend that in the report language it is clarified that (c)(1) applies to lease sales, OCS lease sales specifically. This is needed because the Court essentially said it is (c)(3), not (c)(1) which governs lease sales. So that point does need clarification.

Very briefly, because I see my time is up, I would like to say that we are not in favor of a broad exemption on the fisheries issue. We think it would create a very bad precedent, and the problem that has arisen concerning fishery management plans has been very localized. We would be willing to work with this committee and the fishing industry toward some kind of accommodation because we do recognize that fishery management councils, as distinct from other Federal activities, give the States a very major role, but we are not in favor of the absolute, broad exemption.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF SARAH CHASIS ON BEHALF OF THE NATURAL RESOURCES DEFENSE COUNCIL, INC., THE COAST ALLIANCE, THE SIERRA CLUB, AND THE NATIONAL AUDUBON SOCIETY

I would like to thank this Committee for inviting me to testify today regarding S. 2324. This testimony is presented on behalf of the Natural Resources Defense Council, the Coast Alliance, the Sierra Club and the National Audubon Society.

I. The Need for Legislation

A. INTRODUCTION

The legislation before this Committee today is of the utmost environmental importance. The enactment of this bill into law this session is a top priority of the environmental community. We strongly support this bill because it would overturn the recent decision of the United States Supreme Court (*Secretary of Interior* v. *California*) which threatens to undermine the structure of the Coastal Zone Management Act (CZMA) and the important protections this Act affords our nation's coastal resources.

The CZMA was passed in 1972, amended in 1976, reauthorized and strengthened by Congress in 1980 in explicit recognition that the coastal zone contains the most ecologically valuable resources of this country and that these resources are under tremendous development pressure. The mechanism established by the CZMA to arrest wanton destruction of these resources and provide for orderly growth in the coastal zone was a network of federally approved state coastal zone management programs. These state coastal zone management programs, now in place in 28 coastal states and territories [1] (and about to be put in place in a 29th, Virginia) provide the only comprehensive national program for coastal protection.

In exchange for state development and implementation of these much needed programs, the CZMA promised two things: federal funding and the consistency of federal activities with a state's program, once the state's program was federally approved and so long thereafter as it was implemented in conformance with federal requirements. As you know, this Administration has consistently sought to eliminate the first incentive. Only strong support from members of this Committee and others in

[1] Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, North Carolina, South Carolina, Florida, Alabama, Mississippi, Louisiana, California, Oregon, Washington, Hawaii, Alaska, Wisconsin, Michigan, Puerto Rico, Guam, the Virgin Islands, the Northern Marianas, American Samoa.

Congress has enabled federal funding to continue. Now, the Supreme Court's decision in *Secretary of Interior* v. *California* has substantially undermined the other major incentive to a comprehensive national network of state coastal programs. The Court, in a 5 to 4 decision, has held that the Department of the Interior's federal offshore leasing decisions—in which millions of acres of submerged lands are put up for lease for oil and gas drilling each year—are exempt from the federal consistency requirement, thus frustrating the states' ability to comprehensively plan for their coasts. This holding is bad enough in and of itself; however, the Court's decision goes even further, arguably exempting from the consistency requirement any federally supported or conducted activity beyond the state's territorial waters, no matter how major or significant its impacts on the state's coastal zone. This decision, which renders states powerless to affect major federal activities off their coasts could well lead to the unravelling of the entire system of coastal zone management carefully crafted over the last 10 years. This is why passage of the legislation now before you is so crucial.

B. THE EFFECT OF THE SUPREME COURT'S DECISION

I have attached a legal analysis of the Supreme Court's decision in *Secretary of the Interior* v. *California* to this testimony. I will not go into detail here except to summarize the decision and to describe its broader implications which need to be countered by this legislation.

The Court held that no consistency determination under CZMA § 307(c)(1) is required for federal oil and gas lease sales on the Outer Continental Shelf for three reasons:

1. Congress when it enacted § 307(c)(1) in 1972 intended that it cover federal activities within a state's coastal zone, or on federal enclaves within a state's coastal zone (which are technically excluded from the Act's definition of coastal zone), not federally conducted or supported activities geographically located beyond a coastal state's territorial waters.
2. Federal oil and gas lease sales on the OCS are not federally conducted or supported activities, and thus are more properly subject to § 307(c)(3)(B) rather than § 307(c)(1); yet § 307(c)(3)(B) clearly does not require a consistency determination for lease sales.
3. Issuance of an oil and gas lease only entitles the lessee to conduct "preliminary activities" and no more; thus, a lease sale does not "directly affect" a state's coastal zone.

While the Court's holding was limited to offshore oil and gas lease sales, its impact is much broader. The Court's narrow construction of the geographic scope of §307(c)(1) arguably precludes the application of this provision to any type of federal activity seaward of a state's coastal zone. The Court's reasoning also throws into question § 307(c)(1)'s applicability to federally conducted or supported activities landward of the coastal zone.[2] Finally, the opinion raises questions about § 307(c)(1)'s applicability to important federal decisions which set in motion a chain of events likely to directly affect the coastal zone, but which themselves have no immediate effects on the coast.

The Court in its decision has overturned longstanding interpretations of the Act upon which the states have relied in developing their programs.[3] It is the far reaching scope of the Court's decision which makes particularly urgent the need for Congressional action.

C. THE IMPORTANCE OF REVERSING THE COURT'S DECISION

Unless the Court's decision is reversed, important federal decisions having major impacts on a state's coastal zone will remain exempt from the consistency requirement, and in addition, a major incentive for continued state participation in the federal Coastal Zone Management Program will be removed. Federal oil and gas leasing decisions are not the only type of federal activity to be exempt. Federal leasing of offshore lands for the extraction of ocean minerals, ocean dumping of contaminat-

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[2] Since the Court focused on the Act's coverage of federal activities seaward of the coastal zone, it could still be argued that landward activities are covered; however, the outcome of any litigation on this point is far from certain.

[3] Several longstanding interpretations of the Act by NOAA, as expressed in regulations first issued in 1977, are directly at odds with the Court's decision. For example, 15 C.F.R. 930.33(c) states that: "Federal activities outside of the coastal zone (e.g., on excluded Federal lands, on the Outer Continental Shelf, or landward of the coastal zone) are subject to Federal agency review to determine whether they directly affect the coastal zone."

ed dredged spoils, federal disposal of nuclear submarines and radioactive waste are other federal activities which would be exempt. Each of thesee activities has the potential for having major adverse effects on the natural resources of the coastal zone.

For example, the U.S. Department of the Interior's Minerals Management Service (MMS) plans to open up for the first time undersea areas for hard rock minerals mining. Proposed mining techniques would involve huge undersea bulldozers that rip up the mineral-bearing areas. Huge section dredges would then bring the slurry to the surface, where the ore would be separated from sediment and water and transported to shore. In addition to massive disruption of the ocean floor, this process would involve the discharge of wastewater and sediment at the ocean surface and the disposal of tailings containing toxic metals into surrounding marine and coastal environments.

The disruption of the seabed and associated biological resources resulting from these activities could have a devastating impact on living resources in the area mined, with possible negative implications for the regional food chain. The cumulative impacts of mining activities to be leased could be expected to degrade water quality in coastal and offshore waters over a wide area.

Until the Supreme Court's decision, the CZMA provided the only effective mechanism the states had for controlling these impacts. After the Court's decision, the states have no effective handle for dealing with these activities.[4]

With respect to offshore oil and gas leasing, the Court's decision has the result of subjecting private activities under a lease to consistency review (§ 307(c)(3)(B)), but exempting the basic federal decision to lease. Yet it is the Secretary of the Interior's decision at the lease sale stage that that sets the basic scope and charter for the later developments. It is at the lease sale stage that DOI makes the choice of tracts to be offered and formulates the standard lease stipulations to be applicable to all subsequent activity. Only if the provisions of § 307(c)(1) are applied at the lease sale stage will these decisions as a whole ever be adequately measured against the provisions of affected state management programs.

The later stages of consistency review under § 307(c)(3)(B), at the exploration and development production stages, cannot substitute for a consistency determination at the lease sale stage. These later reviews are carried out on individual leases at different times. Consistency review on this piecemeal basis, without view at the lease sale stage, would effectively preclude states from ever meaningfully evaluating and responding to the cumulative effects of DOI's OCS lease sales on their coastal zones. While activities on any single tract might not be inconsistent with the terms of the state's management program, the aggregate effects of such activities on a number of tracts in a particular region could be wholly inconsistent with that program. Only by examining the sale as as whole pursuant to § 307(c)(1) can the cumulative impacts be adequately assessed.

II. Comments on S. 2324

A. BASIC SUPPORT

We strongly support the language of S. 2324. The bill clarifies that § 307(c)(1) covers federally supported activities outside, as well as within, the coastal zone. It also clarifies the meaning of "directly affecting." Finally, it clarifies that full consistency is required except in specified circumstances. S. 2324 would essentially reestablish the status quo that existed prior to the Supreme Court's decision and is thus remedial in nature.

B. RECOMMENDATIONS

1. General recommendations

We strongly recommend that the legislation clarify the following points. First, it should make clear that federal lease sales, whether within or outside the coastal zone, are "federally supported or conducted activities" and, hence, are subject to § 307(c)(1), not § 307(c)(3). Second, the legislation should reflect the fact that OCS lease sales do set in motion a chain of events likely to directly affect the coastal zone and, as such, are intended to be subject to § 307(c)(1) (even if there are subse-

[4] Some will no doubt argue that § 19 of the Outer Continental Shelf Lands Act provides adequate protection of state interests in offshore leasing. The history of this section shows how unfounded this argument is. In lease sale after lease sale (e.g., Lease Sales 52, 53, 76), the Secretary of the Interior has rejected States' Section 19 recommendations.

quent federal approvals required before later stages are commenced).[5] Relatedly, the legislative history should reflect the significance of the lease sale stage and the importance of having the CZMA, as well as other environmental statutes such as the National Environmental Policy Act and the Endangered Species Act, apply at that stage. Each of these points is needed to counter the Court's findings that 1) lease sales are properly subject to § 307(c)(3), not § 307(c)(1); and 2) that OCS lease sales do not "directly affect" the coastal zone.

2. Specific recommendations

a. (c)(1)(A)(i), (ii) and (iii)

With respect to the first exception ("undertaken to counter the immediate effects of a declared national emergency"), we recommend that it be clarified that the bill refers to a "presidentially" declared national emergency.

With respect to exception (ii) we have two major concerns. First, a careful definition is needed of what is meant by "national security" and second, it should be clarified who should make this determination. We recommend that this exception be strictly limited to instances in which military operations require the undertaking of certain activities. The Secretary of Interior should not be able to claim an exception for offshore oil and gas lease sales. (Unless it is made clear that this is not what the exception refers to, it is likely to be used in precisely such a manner.) [6] We also recommend that a neutral party, such as the Secretary of Commerce be the one to make the determination and that a process be set up to ensure that the agency requesting the exception carries the burden of proof, with opportunity for public comment built into the process. Such a process would help prevent abuse of the exception and, by providing for one decision-maker, would help ensure consistency of federal decision-making. It makes sense for the Secretary of Commerce to be the decision-maker since the Secretary has responsibility for enforcing the Coastal Zone Management Act.

With respect to exception (iii), we recommend that the language of the bill be clarified so that federal agencies must adhere to state coastal programs "unless the conduct or support of the activity in that manner is prohibited by federal law." Only if full consistency is prohibited based on the requirements of federal law applicable to the agency's operations should an exception be allowed. This is the long-standing interpretation which NOAA has used since 1978, 15 C.F.R. 930.32(a), and under which federal agencies have operated for the last six years.

b. No lowering of Federal standards

We think it is extremely important that in enacting this legislation Congress make clear that it is not intended to lower federal standards in any way. NOAA regulations, 15 C.F.R. 930.39(d), presently provide that:

"When Federal agency standards are more restrictive than standards or requirements contained in the State's management program, the Federal agency may continue to apply its stricter standards (e.g., restrict project development or design alternatives notwithstanding permissive management program policies) . . ."

Congress should make clear that its intent is to maintain this approach.

c. Scope of consistency determination

It would be helpful for Congress, as part of the amendment process, to clarify the scope of the consistency determination required of federal agencies by § 307(c)(1). We recommend that the determination assess the consistency of all reasonably forseeable impacts of the proposed activity, including later stages of that activity, utilizing best available information to make the assessment.

III. Issues in Controversy

There are several important issues which have arisen in connection with this legislation which we would like to address. They include the following: whether the legislation would give the states a "veto" over federal actions; whether there should be some kind of exemption for fishery management plans; and finally, whether the landward reach of the bill should be limited.

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[5] Similarly, it should be made clear that other federal activities which set in motion a chain of events likely to affect the coastal zone are also subject to § 307(c)(1) even if subsequent federal approvals are required down the road.

[6] The Secretary of Commerce's recent determination under § 307(c)(3) that oil development of the Santa Ynez unit off California for oil and gas production was needed for national security reasons gives us particular cause for concern on this point.

A. STATE VETO

The argument has been made that the proposed language would give states a veto over offshore oil development. This argument is without merit.

First of all, it is the federal agency, not the state, that decides whether the proposed activity is or is not consistent with the state's coastal program. Under NOAA's existing procedures, if a state does not concur in the federal agency's consistency determination and mediation cannot resolve the differences, the state must take the federal agency to court. Unless a court overturns a federal agency's decision, the federal action may proceed.

Second, the state coastal management programs with which federal agencies are required to be consistent are federally approved programs, which must meet the standards set out in Sections 305 and 306 of the Act before the consistency requirement becomes applicable. Thereafter, application of § 307(c)(1) is conditioned on state implementation of the federally approved program. Section 312 of the CZMA requires continuing review by NOAA of state implementation of their programs. NOAA is required to withdraw approval of any program if the state is failing to adhere to and is deviating without justification from the approved management program. § 312(d). If federal approval is withdrawn, the consistency requirement no longer applies. § 307(c)(1).

Finally, federal agencies play an important role in the initial development of a state's coastal zone management program. Under the CZMA, NOAA may not approve a state's program "unless the views of Federal agencies principally affected by such programs have been adequately considered." § 307(b). Another prerequisite for approval is a finding that the state's program "provides for adequate consideration of the national interest." § 306(c)(8).

Thus, the structure of the CZMA assures that arbitrary actions by states to "veto" federal actions cannot occur. Indeed, the record to date demonstrates that this has not occurred.

B. FISHERIES EXEMPTION

The argument is made by some that fisheries management plans adopted pursuant to the Fishery Conservation and Management Act (FCMA) should be exempt from consistency review because states already play a key decision-making role in the adoption of fishery plans and because the additional consistency requirement would threaten regional fisheries management. We have serious concerns about giving a broad exemption for what amounts to a very localized problem. At the same time, we recognize that this conflict could emerge in other states and may need to be addressed in some form at a later point.

Unlike other federal activities subject to § 307(c)(1), the FCMA gives the states a major role in decision-making. As opposed to an activity such as OCS leasing over which states have little power, the key decision-makers under the Magnuson Act are the Regional Fishery Management Councils. Membership on these Councils is made up primarily of people recommended by the Governors of the states in the region. The Secretary of Commerce's authority to review the decisions of these Councils is limited, particularly after the 1983 Amendments to the Magnuson Act. (The Secretary may disapprove a management plan if it would violate the Act; however, if it falls within the discretionary range, then the Secretary may not second-guess the Council.) Because of this key state role in decision-making, some accommodation to the fishing interests may be in order, though not in the form of a broad exemption. We would be happy to work with members of this Committee, representatives of the coastal states and the fishing industry to achieve a solution to this problem.

However, we do not believe a generic, broad exemption is justified for three main reasons: (1) the problems that have arisen are restricted to one state; (2) we believe the two acts can be administered compatibly; and (3) a general exemption would set a bad precedent of exempting federal agencies from consistency requirements.

The fact is that there has been little problem to date between the consistency requirement and fishery management, with the exception of Florida.[7] In Hawaii, dis-

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[7] Brief History of Florida Situation:

A. Mackerel Plan.—A joint mackerel plan was developed by the South Atlantic and Gulf Coast Regional Fisheries Council. The former prohibited the use of purse seines in the Atlantic; the latter permitted their use in the Gulf. NMFS sent the plan back for revision primarily because it believed the mackerel fishery should be handled as a single unit. Because it was determined that the information that existed did not show that prohibition of purse seines was

Continued

agreements between the state and NMFS were eventually worked out with both making revisions to their respective regulations. In Oregon, the state raised but never pushed consistency as an issue when the federal government imposed a salmon management plan within the state's coastal zone. Since most states have not incorporated state fishing regulations into their programs (and may not without NOAA's approval), the potential for conflict is limited.

NOAA Administrator's Letter No. 37 ("Interrelationship of the Magnuson Act and the Coastal Zone Management Act") (Nov. 24, 1982) spells out the manner in which the FCMA and FCZMA can be implemented in a compatible manner in almost all cases. This letter makes clear that while consistency should apply to fishery management plans (FMP's), states may not force adoption of FMP's which are inconsistent with the national standards or other provisions of the FCMA (p. 7). Moreover, if an FMP is either more or as protective of the fishery resource as the state's CZMP, the FMP need not be altered, nor need it be altered if conditions offshore are demonstrably different from those nearshore.

The principal thrust of the legislation before you today is to reestablish Congress' intent that all federal activities be consistent with state coastal zone management plans. This goal should not be obscured by potential difficulties of coordination between fisheries management plans and state coastal zone management plans, particularly since the problems are of very limited scope and can be compatibly resolved without reference to this legislation.

C. LANDWARD REACH

Concern has been expressed that, as drafted, the bill would extend the reach of consistency too broadly--to cover projects far inland which have negligible effects on the coastal zone. We believe this fear is groundless for three reasons. First, NOAA regulations have always provided that federal activities landward of the coastal zone are subject to consistency. See 15 C.F.R. 930.33(c). This legislation merely re-establishes the status quo prior to the Supreme Court's decision on this point. Second, to date, this requirement has not led to major problems between federal agencies seeking to proceed with upland activities and state coastal zone management programs. In most instances, federal activities at any distance from the coastal zone have not had significant effects on the coastal zone. Third, it makes sense for federal activities, wherever located, to be consistent with state coastal programs if they will directly affect the coastal zone. Activities landward, as well as seaward, can have major, significant impacts on the natural resources of the coastal zone. Should such activities be exempt from consistency review? We think not.

Legal Analysis of Secretary of Interior v. California [1]

BACKGROUND OF DECISION

Plaintiff California Coastal Commission and others [1] brought an action to enjoin the Secretary of the United States Department of Interior from proceeding further

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needed, the Councils decided to allow use of purse seines along both coasts. The State of Florida objected to the revised plan arguing that it was inconsistent with the state's prohibition on purse seining, a requirement incorporated into its coastal program. NMFS refused to require that the plan be revised to be consistent with Florida's coastal program on the grounds that to do so would be inconsistent with the national standards of the Magnuson Act, in particular the standard which requires use of "best scientific information available" in developing a fishery plan.

Florida has sued NMFS over its approval of the plan, but has so far been unsuccessful in obtaining relief. In a related case, the mackerel fishermen, have brought a separate suit against Florida to prevent enforcement of the state's landing laws.

B. Grouper, Snapper Plan for South Atlantic.—Florida argued that because the FMP allowed used of fishtraps, it was inconsistent with the Florida CZMP. NMFS rejected this on the grounds that the existing "best scientific information available" did not demonstrate the need for a prohibition on fish traps. Florida has sued on this plan as well.

C. Reef Fish Plan.—This is at the NMFS regulation drafting stage. A similar controversy has arisen with respect to this plan.

[1] This analysis was prepared by Lynne Edgerton and Sarah Chasis, staff attorneys for the Natural Resources Defense Council, Inc.

1. The litigation was instituted through separate but similar complaints filed by the State of California, the Natural Resources Defense Council, Inc., The Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53. Intervening as plaintiffs were the counties of Humbolt, Marin, Mendocino, Monterey, San Diego, San Luis

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with federal outer continental shelf (OCS) Oil and Gas Lease Sale 53 off the California coast,[2] alleging that § 307(c)(1) of the Coastal Zone Management Act of 1972 (CZMA) requires that federal agency action that "directly affects" a state's coastal zone be consistent with the state's coastal zone management plan, that federal lease sale 53 would "directly affect" California's coastal zone in that oil spills could be expected to threaten the Southern Sea Otter, a species given special protection in California's coastal zone, and that the Secretary had illegally refused to comply with California's demand for a consistency determination (a showing that the lease sale would be "consistent" with the State's coastal zone management program "to the maximum extent practicable"). The district court entered a summary judgment for plaintiffs on the CZMA claim. The Court of Appeals for the Ninth Circuit affirmed that portion of the judgment requiring a consistency determination before the lease sale.

On certiorari, the Supreme Court reversed. No consistency determination under CZMA § 307(c)(1) is required for federal OCS oil and gas sale lease activity because such activity does not "directly affect" the coastal zone within the meaning of that phrase. Congress used § 307(c)(1)'s "directly affecting" language to clarify that federal activities conducted or supported on federal lands physically situated in the coastal zone but excluded from the zone as formally defined in the Act must be consistent with state coastal management plans. CZMA § 307(c)(1) was not intended to apply to activities geographically located beyond a coastal state's territorial waters. Furthermore, no consistency determination under CZMA § 307(c)(1) is required for federal oil and gas lease sale activity on the OCS because the structure of CZMA § 307(c) indicates that it is § 307(c)(3), not § 307(c)(1), which reaches activities in which the principal actor is a private party (e.g., lease sales). Finally, even if CZMA § 307(c)(1) were applicable, no consistency determination is required because a lease sale does not "directly affect" the coastal zone because under OCSLA issuance of a lease merely entities the lessee to conduct "preliminary activities," which activities the parties to the litigation conceded to have no significant effect on the coastal zone. *Secretary of Interior et al.* v. *California et al.*, 104 S. Ct. 656 (1984) (5–4 decision).

The Court's analysis of whether CZMA § 307(c)(1) requires state participation in OCS leasing decisions was structured as follows. First, the Court noted that the statute nowhere defines "directly affecting" the coastal zone and that CZMA's implementing regulations are "of such tortured vacillation" that they are not entitled to judicial deference. 104 S. Ct. 661. Next, the Court determined that the "directly affecting" language of § 307(c)(1) was intended to effect a balanced compromise between the two different definitions of the "coastal zone" contained in the CZMA bills first passed by the House and Senate. 104 S. Ct. 662. Neither original bill contained the "directly affecting" language. 104 S. Ct. 661. In both the House bill and the Senate bill, § 307(c)(1)'s consistency requirements extended only to federal activities "in" the coastal zone. *Id.* However, the Senate bill defined the coastal zone to exclude "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents." 104 S. Ct. 662. By contrast, the House bill's definition of "coastal zone" included lands under Federal jurisdiction; thus, federal activities on those lands were to be fully subject to § 307(c)(1) consistency requirement. *Id.* The Court found that under both bills, however, submerged lands on the OCS were entirely excluded from the coastal zone, and that federal agency activities in those areas were thus exempt from § 307(c)(1)'s consistency requirement. The Court determined that the Conference Committee and Congress had ultimately accepted the Senate's narrower definition of the "coastal zone" but then expanded § 307(c)(1) to cover activities on federal lands not "in" but nevertheless "directly affecting" the zone so that federal parks, military installations and other federal lands lying within the coastal zone remained within the reach of § 307(c)(1)'s consistency provisions. Accordingly, the Court construed the reach of § 307(c)(1) to extend only to Federal agency activities within the geographic boundaries of the coastal zone, and to exempt all Federal agency activity conducted or supported on the OCS.

Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, and Sonoma; the City and County of San Francisco; the cities of Brisbane, Capitola, Carmel-by-the-Sea, Los Angeles, Marro Bay, Pismo Beach, San Luis Obispo, Santa Barbara, Santa Cruz, Santa Monica and Seaside and the Association of Monterey Bay Governments. *California* v. *Watt*, 520 F.Supp. 1359 (C.D. Cal. 1981).

2. Plaintiffs challenged the sale of 32 of the 115 tracts located in the Santa Maria Basin located off Western Santa Barbara. These tracts are situated within twelve miles of the Sea Otter range. *Secretary of Interior, et al.*, v. *California, et al.*, 104 S. Ct. 656, 660 (1984).

The Court butressed its conclusion by pointing out that the 1972 Congress had debated and rejected four proposals to extend parts of CZMA to reach OCS activities. 104 S. Ct. 663. More specifically, the Court pointed to the Conference Committee rejection of Section 313 (requiring the Secretary to develop "a program for the management of the area outside the coastal zone and within twelve miles of the [coast]"), and Section 312 (inviting the Secretary to extend coastal zone marine sanctuaries established by the states into the OCS region) of the House CZMA bill as indicating Congress' refusal to extend parts of CZMA to reach OCS activities. 104 S. Ct. 664-5. The Court therefore reiterated its earlier conclusion that § 307(c)(1)'s "directly affecting" language was aimed at activities conducted or supported by federal agencies on federal lands physically situation in the coastal zone but excluded from the zone as formally defined by the Act. 104 S. Ct. 666.

Secondly, the Court reviewed the overall structure of CZMA § 307(c) and concluded that it is § 307(c)(3), not (c)(1), that would have been the logical and appropriate place for inclusion of a CZMA requirement of federal OCS lease sale consistency with state plans and that neither CZMA § 307(c)(3)(A) nor § 307(c)(3)(B) can be fairly read to include such a requirement. 104 S. Ct. 667. Section 307(c) is divided into three parts: paragraph (1) pertains to activities "conduct[ed] or support[ed]" by a federal agency; paragraph (2) applies to "development projects" "undertake[n]" by a federal agency; paragraph (3) governs facilities which require federal agency issuance of licenses and permits. According to the majority, "[t]he first two paragraphs reach activities in which the federal agency is the principal actor, the third reaches the federally approved activities of third parties." 104 S. Ct. 667. The Court's reasoning, then, distinguished the sections by looking at whether the principal actor was the federal government. If it was, then sections (1) and (2) apply. If the principal actor was to be a private third party, then the activity should be covered by section (3). In the instant case, the Court summarily concluded that the principal actors in lease sale activity are private parties, not the federal government, and thus § 307(c)(3) should be the provision of § 307(c) under which lease sales must fall, if at all.

After noting that CZMA § 307(c) as originally enacted in 1972 did not apply to any OCS activity, the Court found that Congress, in the 1976 CZMA amendments, renumbered § 307(c)(3) as § 307(c)(3)(A) and added a new section § 307(c)(3)(B) to require consistency of OCS exploration and development and production activities with state coastal zone management plans. 104 S. Ct. 668. The Court then looked to OCSLA and its 1978 amendments, and concluded that it provides for four very discrete stages of OCS development wherein an OCS lease does not entitle a leasee to explore, or develop and produce oil or gas on the OCS without subsequent additional federal approval of exploration and development plans. Because a lease only gives the lessee these very limited rights, the Court found that activities authorized by lease cannot in any event be considered "exploration" or "development and production" under § 307(c)(3)(B). Therefore, the Court reasoned. § 307(c)(3)(B) clearly does not require a consistency determination for lease sales. 104 S. Ct. 670.

The Court noted that under the 1978 OCSLA Amendments, the sale of a lease grants the lessee the rights to conduct only very limited "preliminary activities" on the OCS. 104 S. Ct. 672. Full scale exploration, development, or production may not begin until separate, subsequent federal approval has been obtained, and approval may be denied on several grounds. *Id.* Because approval may be denied, the Court reasoned, the possible effects on the coastal zone that may eventually result from the sale of the lease were held not to be "direct." *Id.* The Court stated that the policy decision of when to make the consistency review was not open to the Court to decide since it had already been made by Congress. *Id.*

THE BROADER IMPLICATIONS OF THE DECISION

Importantly, the Court left a number of significant issues unresolved:

(1) whether § 307(c)(1) applies to other OCS activities such as ocean dumping of sewage sludge and radioactive wastes;

(2) whether § 307(c)(1) applies to cover federal agency activities which are landward of the coastal zone;

(3) whether the Court by implication rejected both the Department of Interior's proposed definition of "directly affecting" as meaning "having a direct, identifiable impact on the coastal zone" and also California's proposed definition as meaning "initiating a series of events of coastal management consequences"; and

(4) whether § 307(c)(3)(A) is restricted to the three-mile coastal zone or whether it extends to the OCS.

Although the Supreme Court stated that it was reserving the question of whether some types of federal activities conducted on the OCS could fall within § 307(c)(1)'s ambit, the Court's reasoning arguably precludes the application of § 307(c)(1) to other federal OCS resources activities because of the Court's finding that "Congress expressly intended to remove the control of OCS resources from CZMA's scope." 104 S. Ct. 663. The Court cites a number of statements made in the House and Senate floor debates that CZMA is concerned only with activities on land or in the territorial sea, not on the outer continental shelf. 104 S. Ct. 663, fn. 11. The Court cited for additional support a proposed floor amendment to the CZMA by Senator Boggs, which would have required a consistency determination for the construction of offshore facilities, that was rejected because it dealt with the contiguous zone (3–12 miles offshore) while the CZMA was restricted to the territorial sea. 104 S. Ct. 665, fn. 14. The Court also used the rejection of Section 313 and Section 312(b)(c) of the House CZMA bill, 104 S. Ct. 663–665, to further support its holding that no part of the 1972 CZMA was to reach beyond the three mile territorial limit. 104 S. Ct. 663.

Whether federally supported or conducted activities landward of the coastal zone are subject to § 307(c)(1) was not at issue in the instant litigation. The Court's holding was based on a view that the entire CZMA, including § 307(c)(1), "is concerned only with activities on land or in the territorial sea, not on the outer continental shelf . . ." 104 S. Ct. 663. Nonetheless, the Court's very narrow construction of "directly affects" as a geographical limitation might portend a similarly narrow reading of the landward reach of § 307(c)(1).

Because the Court did seem to hold that the entire 1972 CZMA did not apply to the OCS, a view that § 307(c)(3)(A) applies to the OCS would depend on a statutory construction that the 1976 Amendments, which renumbered § 307(c)(3) as § 307(c)(3)(A), effected such an extension of scope. The 1976 legislative history indicates that the 1976 Congress believed that § 307(c)(3)(A) applied to activities geographically located outside the coastal zone itself. 104 S. Ct. 666, fn. 15.

The Court's interpretation of "directly affecting" accepts neither the Department of Interior's proposed definition of having a "direct, identifiable impact on the coastal zone," nor California's proposed definition of "initiating a series of events of coastal management consequence." 104 S. Ct. 661. Apparently, the Court's construction of § 307 made unnecessary any further discussion of whether the lease sales "directly affected" the coastal zone, since the lease sales were on the OCS. Although the Court did not explicitly reject the proposed definitions, the Court's refusal to accept either of them should be read as an implied rejection of both.

The Chairman. Thank you.

Ms. Raisbeck.

Ms. RAISBECK. Thank you, Mr. Chairman.

I am speaking today on behalf of Friends of the Earth, the Environmental Policy Institute, and Green Peace. I would also like to say that the groups I represent endorse the comments of Sarah Chasis from NRDC.

A couple of points I would like to highlight. I just feel it is so important that I must emphasize the Supreme Court's decision has really gone to the heart of coastal zone management, and the very integrity of that program is at stake. Your bill, passage of your bill, is extremely important to rectify what we believe was a serious misreading, misinterpretation of what Congress intended under the Coastal Zone Management Act.

The Federal-State partnership aspect of that act, and of the programs is crucial to its working effectively to provide balance of development and protection of coastal resources and the coast. As we all know, the Federal Government is responsible for many multimillion dollar projects of all kinds, of which the Federal offshore leasing program is just one. And if those programs no longer have to be consistent with the State programs, it is our serious fear that there will be very little incentive to States to keep up their programs because they will have lost a crucial piece of the cooperative

nature of that program between the States and the Federal Government.

What is at stake here is balance. I know people on both sides of this issue have been talking about balance today. I just want to review very quickly what we feel has been a serious imbalance in the offshore drilling program particularly over the last 4 years, which is I think at the heart of why we are here today. One of the most important changes that was made in the offshore program was to move to areawide leasing. Prior to this administration, leases were only offered at the size of about 2 million acres. Very few, I think, were slightly larger than that.

We are now looking at lease sales, 20, 40, 60 million acres at a time, which is just an incredible size for States to try to plan for or for local governments, for that matter. Nobody has the resources to look at these areas carefully and to make decisions intelligently as to where it is appropriate to lease and not lease when they are looking at such a huge area. So I think that one thing that has happened, of course, is that Secretary Clark has brought some important changes to the program which I think will result in a more open process, more consultation with the States. However, what has not changed is the areawide leasing concept, and the States are still going to be struggling with that concept.

In our view, to have consistency in handling at the leasing end of the stage will help the States enormously in helping to limit the tremendous size of the sales. The State of California, while it did have—it did sue on the lease sale 73, has principally been interested in very specific areas. The prior sale of the central northern California was lease sale 53 in which the State sued on specific tracts that were approaching very close to the threatened sea otter habitat. The sea otters are numbered only about 1,500 at this time, and it is expected that their numbers may be dwindling, and the State, I think, was very right in trying to restrict leasing, not just exploration and drilling, but leasing of that endangered habitat.

What happened then on 73 was that Interior came back with a consistency determination that was so broad and so vague that the State simply rejected it out of hand.

I have also mentioned in my written testimony that Alaska, I think, has just tremendous problems with areawide leasing. Areawide leasing is still going forward up there. The State and the Department of the Interior are in negotiations right now on a couple of sales that are just of enormous biological importance, particularly the Bristol Bay area and the St. George Basin and the Bering Sea.

We were rather distressed at the recent proposed notice of sale for the Beaufort Sea in which the Interior Department did not accommodate some of the restrictions that the State had wanted to put on that sale, particularly with regard to the bowhead whale. I am aware of your long history in the protection of marine mammals, and particularly the enormous contribution you have made to the protection of whales, and the failure of Interior to accommodate the needs of endangered bowheads up there, I am afraid, is indicative that though the process is improving, in substance, we are not at all confident that this administration is going to be willing to set aside particular areas of very important habitat.

I just want to make a couple of other points. In our view, the assertion that this bill would cause a State veto is wrong. It is the Federal agency that has to make consistency determinations. Then it is up to the State, if they disagree with that determination, to challenge the Federal agency, and the State must take the agency to court and prove that the Federal agency's activity was not consistent with the State plan.

Thank you.

[The statement follows:]

STATEMENT OF ELIZABETH RAISBECK ON BEHALF OF THE FRIENDS OF THE EARTH, ENVIRONMENTAL POLICY INSTITUTE, AND GREENPEACE

Mr. Chairman and members of the committee, I am pleased to present this testimony today on behalf of the Environmental Policy Center, Greenpeace and Friends of the Earth. We also endorse the statement made today by Sarah Chasis of the Natural Resources Defense Council.

The groups I represent strongly endorse the legislation before you today, which would restore Congressional intent that federal agency activities that directly affect the coast should be consistent with state Coastal Zone Management programs. We view the recent Supreme Court decision as a serious misreading of the law and the intent of Congress.

Without this legislation, we are concerned that the effectiveness of the Coastal Zone Management program will be severely damaged, and that the federal-state partnership that was established under the CZM Act to promote both protection of coastal resources and rational planning for development in the coastal zone will be seriously undermined. One of the most important aspects of the CZMA is the concept that federal activities that affect the coast must be compatible with the state's established program for directing and controlling coastal development. This concept has been an important incentive to states to join the CZM program, which is voluntary. Without proper coordination with major federal activities, the best plans and programs could be rendered ineffective.

In reasserting congressional intent on consistency, this legislation does two very important things: It clarifies that any federal activity which begins a chain of events that will directly affect the coast must meet the consistency test, and it establishes the principle that any federal activity that directly affects the coast, whether within or outside the coastal zone, must demonstrate consistency with the affected state's program.

Both the immediate and cumulative impacts of federal activities on the coast are significant. Some of these occur within the coastal zone, but a number do not. Each state has defined its landward boundary of the coastal zone differently. Thus, while in some states federal activities must be consistent with other activities in a very broad area, in other states, the boundary is a narrow rim along the sand dunes, and development activities immediately behind the area could have significant impact upon the coast. It might be argued that only federal activities to seaward of the coast should fall under the consistency test. Such a narrow definition could eliminate from consistency compliance a number of federal activities that could have a very immediate and profound impact on the coast. We oppose eliminating the shoreward application of consistency, because to do so would seriously undermine the integrity of the consistency provision's purpose of coordinating federal and state activities affecting the coast.

To date there has been little use of consistency application toward landward projects. In fact, it is most unusual for any federal project to go forward unless the state is supportive of it. Thus the consistency application would be a safety net to assure that in the rare instances where conflict arises, the federal agency will adjust its activities as necessary to comply with coastal plans.

THE CASE FOR APPLYING CONSISTENCY TO OCS LEASING

Off-shore energy development presents major planning problems for the states. Not only the danger of oil spills from rigs or tankers, but the related on-shore development poses serious problems for states. New shore stations mean new docks, storage tanks, pipeline terminals, and in some cases new roads to the area. Both on-shore and off-shore development mean increased air pollution and increased water pollution from even small spills.

The coast is the home of intensely competing human interests and uses. It is government's duty at all levels to try to serve the public by establishing a balance among these competing interests. As long as the coast and ocean support major economies such as fishing and tourism, which are dependent on a healthy natural environment, the states, local governments and the public will insist on a major role in federal decisions which affect these other vital economies. The application of the consistency determination to OCS leases is a most appropriate mechanism for achieving this balance. It forces the federal government to make every effort to comply with state plans, and yet does not unalterably tie the agency's hands.

In fact the states are not generically opposed to leasing. It is clearly in the economic interests of states to accommodate off-shore oil and gas development. Indeed, several states are engaged in promoting these activities. It is unfortunate that state and public opposition to off-shore oil and gas development in certain site-specific areas is being misinterpreted by some as opposition to all offshore energy development.

The problem is that with the advent of the Reagan Administration the concept of balance was abandoned by the federal government, and only one use, energy development, was given priority over all other uses. A compelling case for offering virtually the entire OCS for lease in five years simply has not yet been made. In fact, the most promising areas are indeed being developed, such as the Diapir Field off the North Slope of Alaska and the Arguello oil field off of California. Other areas which are very sensitive environmentally are being disputed, and in some cases leasing has been forced into postponement. What we need is a regional and national consensus on how fast to develop our off-shore energy resources and which areas are of such national and regional importance that they should be developed only after we have looked elsewhere.

Application of the consistency test to OCS leasing is particularly necessary as long as the Administration pursues the area-wide leasing approach. Area-wide leasing is clearly a major stimulant to state, local and public opposition to off-shore leasing. Despite the new Interior Secretary's commitment to "policy, process and personnel" in running the OCS leasing program, the continuation of the area-wide approach presents major problems for the states and the environment. Most importantly, there is still absolutely no commitment by the Secretary to delete areas of particular concern to the states or localities for environmental reasons.

Under DOI's new approach, areas of low interest to industry will be deleted early in the process, during the fourth month. At no time, however, is there any guarantee that areas of environmental concern to the public or the state(s) affected will also be deleted. Thus the process is still balanced heavily toward development, even though the process is, on its face, more open.

The area-wide approach allows the Secretary to have a call for information on 30-, 40- or 50-million acres, and four months later cut the acreage in half while not deleting any area of real concern to the state. This is, in fact, what has just happened in the Diapir Field Proposed Notice of Sale, where DOI has cut the sale in half, but only deleted the outer deep-water tracts which industry is not interested in. Although the Notice was published two weeks ago, as of 3/23 the state office in D.C. was still waiting for maps showing where the sale will take place. DOI plans to move forward with the nearshore half of the planning area, including a large area in the migratory path of the bowhead whale. Despite strenuous objections by the state of Alaska and the North Slope Eskimos who depend heavily on the bowhead for subsistence, the Proposed Notice also includes the entire eastern half of the planning area, which is probably a major and perhaps critical feeding area of the bowheads.

Perhaps most disturbing about the Diapir Notice is that DOI is now planning to lift the seasonal drilling restriction in the Beaufort Sea, so that drilling activities could go forward all year, even during the months the bowheads migrate along the coast. These decisions could have a very serious impact on the bowhead, of which only about 4,000 remain.

The bowhead is probably the world's most endangered whale. Its habits are little known. Underwater sound from drilling activities will carry for many miles and could cause serious disruptions in the whales' sonar communications. The summer migration to the Beaufort Sea is the critical feeding season for the whales. We have no idea what harm could come to these extremely endangered mammals from OCS energy activities. Furthermore, the possibility of an oil spill in these arctic waters is very likely. The EIS concluded that a major oil spill during the time of the bowhead migration could kill half the population. These recent decisions by the DOI raise serious concerns about whether the changes in the OCS program in recent weeks are substantive or whether they are really a smokescreen for business as usual.

Another serious problem of the area-wide approach is that it induces scatter-shot leasing across an enormous territory. Thus states and the federal government will have to evaluate the potential environmental impacts among several different ecological systems at once, often with every incomplete biological and geophysical information. Even if the sale size is cut in half early in the process, planning for 10-, 20-, or 30-million acres is a herculean task. (It should be noted that sale size was limited to two million acres, three million at most, under the Carter program.)

The results of the recent first sale in the Eastern Gulf of Mexico (Sale #79) covering 50 million acres are indicative of this problem. Seven hundred miles of what is probably our most biologically productive coastline were put up for sale at once. Ultimately the Congress created a 20-mile wide buffer along most of the coast for one year, but almost the entire sale area was offered. Florida now has to plan for a cluster of activity down near the keys, another up in the Big Bend area, another running from the Alabama border to Panama City, and still others in a deep-water area east of the Middle Ground coral reef.

If a significant number of these tracts are developed, Florida could face a planning nightmare. Where and how will oil and gas from these scattered sites be transported? What new on-shore facilities will be necessary? Which ones will be developed first? How fast will they be explored?

Florida chose not to use consistency to limit the size of this sale. Elsewhere in frontier areas states have invoked consistency to set aside only very small areas. California's original legal challenge on Lease Sale #53 involved only 30 tracts. New York, New Jersey, Maryland and Virginia each took steps toward opposing leasing certain tracts that were in areas vital to their interests. None of these states has opposed an entire sale on grounds that it was not consistent with their CZM programs.

We strongly endorse the concept of involving as many interests as possible at the beginning of the OCS process. We also support early decisions to make deletions. The earlier that conflicts are resolved the better for both industry and the environment. If industry has a good idea of what stipulations are going to be required by meeting consistency at the leasing stage, it will be able to plan much more effectively for future investments. Companies will be able to adjust their bids so as to take into account the cost of meeting consistency. It is very important that these requirements for early consultation and coordination be established statutorily, so that the whims of secretaries that come and go will not disrupt this important process.

We would also like to call to the attention of the committee that probably the most comprehensive study of oil spills world wide ever conducted concluded that the exploratory stage is the most hazardous stage of operations. According to Gulf Canada Resources, Inc. in a 1982 study, "Analysis of Accidents in Offshore Operations Where Hydrocarbons Were Lost," "It is recognized, and substantiated by the frequencies of blowouts . . ., that exploration drilling is the most hazardous operation." The reason for this is that exploration is full of uncertainties. In fact, there have been two or three blow-outs in the Canadian Beaufort during exploration operations. In at least one of those cases, the shifting pack ice sheared off the drill bit before it could be removed from the sea floor. Considering the enormous hazards and unknowns of energy development off the Alaska coast, as well as the frontier aspects of areas like Georges Bank and northern California, we would strongly oppose any move to lift the consistency application from the exploration stage.

Finally, we would like to address the view that applying consistency to the leasing stage of OCS energy development somehow creates a state veto over federal offshore leasing. We believe that such a position misreads this legislation. Under present law the Secretary of Commerce has fairly broad authority to overrule a state that will not accept a federal agency's consistency determination at the exploration and production stage. He may find that the activity is compatible with the policies and purposes of the CZMA or that the activity is necessary for national security.

Under the legislation before us, equally broad discretion is given to the Secretary of Interior to overrule a state's objection to a consistency determination on a lease sale. Indeed, we share NRDC's concern that the criteria for overruling a state need tightening to ensure that the secretary does not declare every lease sale necessary for national security. We suggest, therefore, that the Secretary of Commerce have final authority on any such overruling of a state's objections by a federal agency.

It is also important to note that the objecting state must take the federal agency to court if it does not approve of the consistency finding, and the burden is on the state to show that the federal activity is not consistent with the law. These are reasonable and quite broad safeguards, in our view, to guarantee that consistency at the leasing stage will not be the equivalent of a state veto.

The CHAIRMAN. Let me ask you a question, Ms. Raisbeck, that was raised by Mr. Bruce. He was talking about the leases that California wanted to stop. I think what he was saying, is you cannot really know if it is inconsistent—leases are so preliminary that it is hard to tell what might flow through them. One hundred were available; only 8 were bid. Therefore, to paraphrase, I think, it is irrelevant to apply a consistency standard to the leasing process.

Do you want to comment on that?

Ms. RAISBECK. Yes, I would.

I think if you look at the conflicts that the States have had, they have been very specific, pretty much site specific. Alaska has been worried about bowhead whale habitat. California has been worried about sea otter habitat. Massachusetts has been worried about the particular areas of George's Bank, the lobster canyons, in particular, shallow spawning areas. The conflicts of New Jersey, New York, Virginia, Maryland, all were on very site-specific areas, and by and large these States wanted to eliminate tracts. It is true. They wanted to eliminate tracts in these certain very sensitive areas. They did not want to oppose the entire lease sale, by and large.

We have no reason to believe that that history will change. States have basically been supportive of offshore leasing in concept. I do not think there is really much evidence to show that that would change.

The CHAIRMAN. By and large you are right. Most states—I do not say this critically necessarily, but most States are driven by a business development philsophy, and if indeed drilling may be good for business, there is going to be a presumption that they ought to do it. It takes a fair argument in the State to even get the State to stop.

Ms. RAISBECK. Right.

The CHAIRMAN. I understand that. Look at some of the sea coast communities that used to be fishing ports or whaling ports, and they might have had some textiles. I can understand the desire for development for people who live there. It is an understandable thing. So to think that those communities are just going to up and say, oh, no, we do not want any business development, we do not want anything that might produce jobs on shore, make our hardware stores sell more goods or make our restaurants have more customers. Normally the philosophy is just the other way around. Of all the groups I worry least about in terms of do they want to get more business are the States.

Ms. RAISBECK. Of course, many have their own programs, offshore drilling programs in State waters.

The CHAIRMAN. Ms. Chasis, let me ask you if you want to comment on some of the types of Federal activities other than oil and gas leasing that would be affected by the Supreme Court decision.

Ms. CHASIS. I think I mentioned a few of them that we are particularly concerned about. The extraction of mineral resources which is being proposed by the Interior Department off the west coast is an activity of major concern. From everything we have heard about it, it could have very significant impacts on the coastal zone of California and Oregon. The burning of toxic wastes at sea,

which it is being considered by EPA at this time is another impact that we are very concerned about in terms of the coast.

There is the possibility in the future of disposal by the Federal Government of radioactive waste. There is the issue of ocean disposal nuclear submarines. There are a whole range of activities presently being considered. And I can see others that we cannot even conceive of now arising in the future for which it will be extremely important to have controls. And unlike OCS leasing. the later stages, of which are at least covered under 307(c)(3)(b) that exists for these other activities in the Coastal Zone Management Act.

The CHAIRMAN. You are right.

I have no more questions. Thank you.

See you later.

Ms. CHASIS. Thank you.

Ms. RAISBECK. Thank you.

The CHAIRMAN. We will conclude today with Mr. Eldon Greenberg and Mr. Richard Gutting.

Good morning, gentlemen.

Go right ahead, Mr. Greenberg.

STATEMENTS OF ELDON V. C. GREENBERG, ON BEHALF OF THE SOUTHEASTERN FISHERIES ASSOCIATION; AND RICHARD GUTTING, VICE PRESIDENT, GOVERNMENT RELATIONS, NATIONAL FISHERIES INSTITUTE

Mr. GREENBERG. I am pleased to appear today to present the views of Southeastern Fisheries Association with respect to S. 2324.

Southeastern Fisheries Association is the largest commercial fisheries trade association in the southeastern United States. It is headquartered in Tallahassee, Fla., and it has more than 400 members in all sectors of the fishing industry, from North Carolina to Texas.

Simply put, our position is that section 307 of the Coastal Zone Management Act should not be amended in such a way so as to make fisheries management under the Magnuson Fishery Conservation and Management Act subject to Federal consistency review.

To explain why we take the position we do, in the few minutes I have I would like to touch briefly on the state of fisheries management prior to enactment of the Magnuson Act, mention some of the difficulties which have occurred in the application of consistency to date, and, finally, set out the institutional reasons why in our view consistency is inappropriate in the fisheries management context.

With respect to fisheries management prior to the passage of the Magnuson Act, the point I would make is very simple. Prior to the passage of the Magnuson Act we did not have effective offshore fisheries management in this country. We had a hodgepodge of conflicting and inconsistent State laws, and our efforts at interjurisdictional management of fisheries had essentially failed. The Magnuson Act substituted for that confusing and inadequate regime a carefully constructed program based upon scientific management principles.

It was clear that in 1976 Congress understood this was the only way effectively to conserve our fishery resources. At the same time, while the States gave up something in terms of their direct management authority in 1976, they got something back, a workable resource conservation regime in which the States, through the mechanism of the regional fishery management councils, remain in a position of significant influence and control.

The MFCMA is not perfect, but it works, and it would be unfortunate if through the mechanism of consistency, States or private interest groups could upset the balance struck in 1976 and return fisheries management to pre-Magnuson Act days where inconsistent State regulations could defeat rational resource management decisions.

I do not intend to dwell at length on the problems which have arisen until January 1984 in applying consistency in the fisheries management context. They are documented in my statement. I want to emphasize, however, that while those problems have been largely confined to one State, that is, the State of Florida, I believe that the example of the State of Florida will not be lost on others around the country, and I would expect that, if consistency remains an available tool in the fisheries management context, it would be seized upon elsewhere by disgruntled constituencies, that is, the losers in the give and take of council decisionmaking, in an effort to overturn council decisions.

Now, obviously just because there are problems today and likely problems tomorrow does not demonstrate that consistency review is inappropriate in the fisheries context. However, there are several compelling institutional reasons to conclude that application of section 307 makes little sense under the MFCMA.

First and most importantly, I want to emphasize the unique nature of Magnuson Act decisionmaking. Under the Magnuson Act, the States, albeit through the mechanisms of the regional councils, are in the driver's seat. The councils are composed of State representatives, including State fishery managers, and they make the decisions, not some distant bureaucrat in Washington. Congress only last year amended the Magnuson Act to underscore that the Department of Commerce had no power to overturn council decisions on policy grounds.

Second, I want to emphasize the regional nature of the management regime. Fish, as you well know, do not respect political jurisdictions, and the Magnuson Act recognized that the only way to manage fish effectively is on a regional basis, managing the resources throughout their range. That is also the only way to manage the fishing industry which is fair, equitable and understandable.

The very purpose of that Magnuson Act was to remove fisheries management from overlapping and conflicting State rules, and vest decisions, instead, with a regional body with a regionally based perspective. It would be incongruous, in our judgment, if through the backdoor mechanism of consistency a single State could frustrate that purpose.

In concluding, let me just mention that in considering how to respond to the Supreme Court's decision in *Secretary of the Interior* v. *California,* Congress should not make Federal consistency, for all

its desirability in some areas, into a kind of Procrustean bed into which all activities must be forced, without regard to the institutional logic or wisdom of doing so. In our judgment, Congress should reaffirm the regional nature of the fisheries management process and not subject that process to an artificial and unnecessary overlay of Federal consistency.

Thank you.

[The statement follows:]

STATEMENT OF ELDON V. C. GREENBERG ON BEHALF OF SOUTHEASTERN FISHERIES ASSOCIATION, INC.

Good morning. I am Eldon V. C. Greenberg, a partner in the Washington, D.C. law firm of Galloway & Greenberg. I am pleased to appear before the Committee today to present the views of the Southeastern Fisheries Association, Inc. ("SFA") concerning S. 2324 (the "Bill"). The Bill, as we understand it, would amend the so-called "federal consistency" provisions of Section 307(c)(1) of the Coastal Zone Management Act of 1972, as amended (the "CZMA"), so as to overturn the Supreme Court's recent decision in *Secretary of the Interior* v. *California*, 104 S.Ct. ——, 78 L.Ed. 496, (1984) and extend that Section to all Federal activities "directly affecting" the coastal zone, even if they are outside (seaward) of the zone. Simply put, SFA strongly believes that it is inappropriate to amend the CZMA in such a way so as to apply the federal consistency provisions of Section 307(c)(1) to the development and implementation of fishery management plans ("FMPs") under the Magnuson Fishery Conservation and Management Act (the "MFCMA").

SFA, which is headquartered in Tallahassee, Florida [1] is the largest commercial fisheries trade association in the southeastern United States. It has more than 400 members from all sectors of the commercial fishing industry from North Carolina to Texas. SFA, as discussed more fully later in this statement, has been embroiled in complex litigation with the State of Florida over the application of Section 307(c)(1) to the FMP process, and its experience in this litigation lead it to conclude that not only does application of federal consistency have the potential for delaying and disrupting the FMP process, but also that application of federal consistency in fact makes little sense in, and is particularly ill-suited to, fisheries management under the MFCMA. I wish to emphasize that SFA's comments on the Bill are limited to the Bill's application to fisheries; we take no position with respect to its application to Outer Continental Shelf ("OCS") oil and gas lease sales conducted by the Department of the Interior or any other Federal activities, nor, as discussed later in this statement, do we believe our conclusions with respect to fisheries have any necessary implications with respect to the treatment of such activities under the CZMA.

In presenting my testimony this morning, in order to give the Committee a sense of why we arrive at the conclusions we do, I want first to focus by way of background on the state of fisheries management prior to enactment of the MFCMA and the nature of balance of Federal and State authority embodied in that statute. Second, I will proceed to discuss some of the difficulties which have occurred to date in application of Section 307(c)(1) to the FMP process, with particular reference to fishery management controversies with the State of Florida. Third, I will present our analysis as to why the nature of the fisheries management process makes application of federal consistency to that process inappropriate. And, fourth, I will seek to clarify some misconceptions which have arisen or may arise concerning the problems we have identified and the solutions we suggest.

BACKGROUND: FISHERIES MANAGEMENT PRIOR TO THE MFCMA AND THE MFCMA "COMPACT"

Prior to the enactment of the MFCMA in 1976, there was no effective offshore fisheries management in this country; freedom of fishing was the rule beyond the narrow band of the territorial sea and the adjacent, contiguous zone out to 12 miles. Foreign fleets, not subject to U.S. control, were severely depleting the vast fishery resources which lie within 200 miles of our coast. While some individual states sought to manage domestic fishing efforts in fisheries beyond their territorial seas, the management regimes of the various states were a hodgepodge of different, con-

[1] SFA's address and telephone number are: Southeastern Fisheries Association, Inc., 312 East Georgia Street, Tallahassee, Florida 32301, (904) 224-0612.

fusing and often inconsistent laws and regulations. Fisheries management decisions, particularly on the East and Gulf Coasts, were often made on an ad hoc basis each year by State legislatures following fierce battles of lobbyists, rather than by professional managers on the basis of well-articulated scientific standards. Efforts to manage inter-jurisdictional fisheries and to coordinate State efforts, largely carried out through the mechanism of the interstate marine fisheries commissions, had not worked effectively.[2]

The MFCMA was meant to change radically the nature of United States' fishery management. While carefully preserving traditional State jurisdiction within the territorial sea, the MFCMA vested "exclusive" jurisdiction in the United States over fishery resources outside the territorial sea to a distance of 200 miles, creating a Fishery Conservation Zone (the "FCZ"). It vested authority for the management of FCZ resources in Regional Fishery Management Councils (the "Councils")—bodies, as discussed more fully later in this statement, composed largely of State representatives—which were charged with developing FMPs which would then be approved and implemented by the Secretary of Commerce.

In 1976, Congress intended to substitute for the confusing and inadequate fisheries management regime which had previously existed a carefully constructed, rational program for U.S. fishery resources. In the Senate debates on January 19, 1976, Senator Magnuson stated, perhaps more clearly than anyone, the conservation and management objectives of the MFCMA. After describing the makeup of the Councils and their role, Senator Magnuson stated:

"As is evident, we have attempted to balance the national perspective with that of the individual States. We firmly believe that this institutional arrangement is the best hope we can have of obtaining fishery management decisions which in fact protect the fish and which, at the same time, have the support of the fishermen who are regulated. These provisions are greatly needed to straighten out our often confusing present management program. I believe these provisions are imperative for the conservation of our many declining fishery resources."—*MFCMA History* at 455.[3]

The entire Council system is built around implementation of national standards (MFCMA, Section 301(a)), and use of the best available scientific information in order to ensure better conservation of the resources.

The MFCMA is in the nature of a compact as it balances State and Federal authority. The States gave up a substantial part of their direct authority over resources beyond the territorial sea, but in return they got something back—a workable management system in which the states, through the mechanism of the Councils, would remain in a position of significant influence and control. It seems to us to be more than a fair bargain.

II. THE IMPACT OF THE CZMA ON FISHERIES MANAGEMENT AND THE DIFFICULTIES OF APPLICATION OF SECTION 307(C)(1) TO THE FMP PROCESS

The system established by the MFCMA is not perfect, but it works, and, for the most part, it has gained the support of fishermen throughout the country. It would

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[2] The failure of the interstate commissions to provide for effective, regional management was often noted during the debates on the MFCMA. As Congressman Ruppe stated during the House debate on October 9, 1975:

"It is an unfortunate fact that many of our coastal States have failed in the past to deal effectively with common resources. Although we have had for many years three marine fishery commissions under federally-approved compacts, the commissions have been unsuccessful in achieving uniformity among the laws of their respective States. The fisheries of the United States in most cases are found off the shores of a number of States, and if a fishery is to be managed on an intelligent basis, the management plan must be the same. Conflicts between the States could well undermine our efforts to achieve the goals of this legislation."

Statement of Congressman Ruppe, reprinted in Senate Committee on Commerce, A Legislative History of the Fishery Conservation and Management Act of 1976, 94th Cong., 1st Sess. 900 (1976) (hereinafter *"MFCMA History"*). *See also* the Statement of Congressman Studds, *id.* at 996 ("The Commissions established pursuant to these compacts have not been successful in resolving interstate disputes over fishery regulation"). *See generally*, U.S. Commission on Marine Science, Engineering and Resources, Our Nation in the Sea: A Plan For National Action 95-97 (1969).

[3] Both the House and Senate Reports similarly describe the legislation's objectives. *See* H.R. Rep. No. 94-445, 94th Cong., 1st Sess. 30 (1975), reprinted in *MFCMA History* at 1081 ("[E]ffecting integrated regional management has far too often proven illusive or impossible. The Committee has determined clearly that the critically needed conservation and management of our fish stocks cannot be obtained without improved coordination and integration of the respective State and Federal roles"); S. Rep. No. 94-416, 94th Cong., 1st Sess. 15-16 (1975), reprinted in *MFCMA History* at 670-671.

be unfortunate if, through the mechanism of federal consistency under Section 307(c)(1) of the CZMA, the States (or private interest groups) could upset the compact reached in 1976, returning fisheries management to pre-MFCMA days where inconsistent State regulations could defeat rational natural resource management decisions.[4] Recent experience, however, particularly in the State of Florida, reveals that the risk of this occurring is quite real.

As the Committee is aware, Section 307(c)(1), as originally adopted by Congress in 1972, is on its face an inclusive provision. It provides that federal activities which "directly affect" the coastal zone must be consistent "to the maximum extent practicable" with approved State coastal zone management programs. Prior to the Supreme Court's decision in *Secretary of the Interior* v. *California*, the National Oceanic and Atmospheric Administration ("NOAA") considered that this provision applied to the fisheries management process.[5] Consequently, until January, 1984, consistency determinations were made by the Councils for FMPs and their implementing regulations.[6]

While, in some States, such as California or Alaska, where fisheries management is not part of a State's approved coastal zone management program, consistency determinations do not appear to have created major problems to date, in other States, where fisheries management objectives are incorporated in coastal zone management programs—and a substantial number of States with approved programs fall in this category—significant problems have arisen.[7] Recent experience in the State of Florida reveals the inherent difficulties in the application of Section 307(c)(1) consistency to FMPs and their implementing regulations.[8]

Florida, like many other States, has a myriad of local laws regulating salt water fisheries. These laws establish rules on such matters as net size and type, bag limits, allowable gear, and minimum fish length and weight. As a practical matter, the State's laws regarding finfish basically allocated the resources among competing user groups, often with uncertain conservation effects. For example, in many cases, they are primarily aimed at restricting commercial fishing operations by outlawing or limiting the use of efficient commerical gear such as purse seines, fish traps and gill nets. All these laws are incorporated by reference in the state's coastal zone management program, approved by NOAA in September, 1981.

The consistency problem in the Gulf has arisen as the South Atlantic and Gulf of Mexico Councils have developed FMPs within their areas of jurisdiction. In several of these FMPs—mackerel, snapper-grouper, and reef fish, for example—the provisions of the FMPs are in important respects different from and in conflict with the State's rules. These differences and conflicts are set out in tabular form in the attached comprehensive summary of Florida's laws (Tab A). Simply put, the Councils, after examining the overall regional management needs of the resources, have allowed, subject to appropriate conditions and limitations, the use of various types of gear and the taking of various sizes of fish which the State of Florida has deemed impermissible. In every case, these decisions have been made after long, full and open debate, with complete awareness of the State's interest in asserting its own local requirements.

While appropriate consistency determinations under existing CZMA regulations (15 C.F.R. Part 930) were made in connection with the FMP process, nonetheless this has not deterred the State of Florida from continuing to press its own fishery management objectives. Dissatisfied with the Councils' decisions, the State has challenged the FMP regulations on consistency grounds and sought to enjoin their effectiveness. At the same time, it indicated that it would enforce its laws despite existence of conflicting Federal regulations (for an example of one such letter, see Tab

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[4] If there are deficiencies in the MFCMA process, i.e., if some States feel that, while the Council system may be fine in theory, it is being undermined or its responsiveness is being dulled because of bureaucratic interference from Washington, then we suggest these deficiencies should be dealt with directly, under the MFCMA itself, rather than indirectly through the blunt instrument of federal consistency.

[5] *See* Memorandum, dated June 3, 1977, from William C. Brewer, Jr., General Counsel, To Robert Knecht, Robert W. Schoning, and David H. Wallace; NOAA Administrator's Letter No. 37, "Interrelationship of the Magnuson Act and the Coastal Zone Management Act" (November 24, 1982).

[6] For two of the most recent, see, e.g., 48 Fed. Reg. 54383 (December 2, 1983) (Tanner Crab off Alaska); 48 Fed. Reg. 56806 (December 23, 1983) (Northern Anchovy off California).

[7] A discussion of which States do or do not incorporate fisheries management in their coastal zone programs appears in Part IV of this statement.

[8] Consistency problems, it should be noted, have not been limited to the State of Florida. Conflict between the Western Pacific Council and the State of Hawaii over whether the precious coral and spiny lobster FMPs were consistent with Hawaii's coastal zone management program held up implementation of these FMPs for over a year.

B), thus confronting fishermen with the risks of facing possible inconsistent enforcement action. As of January, 1984, (c)(1) consistency was at issue in at least five cases pending in either State or Federal court in Florida. A list of these cases is attached at Tab C. While the position of the State of Florida to date has not been sustained in Court, and while Court orders currently restrain the State from enforcing its regulations, there continues to be substantial uncertainty regarding the rules which now apply and the rules which will ultimately apply in fisheries beyond the territorial sea in the FCZ, and litigation costs continue to grow.

The Supreme Court's decision in *Secretary of the Interior* v. *California*, holding, as it does, that activities outside the territorial sea are excluded from Section 307(c)(1) consistency review, will, absent Congressional action, likely quiet this litigation. But, if Congress should act indiscriminately to reverse the Supreme Court's decision, then there will undoubtedly be years more of consistency litigation in Florida. Moreover, the precedent of the Florida experience will surely influence competing user groups in other coastal States, leading to consistency conflicts around the country. Commercial fishermen, in turn, will have to put up with years more of confusion and cost, while considered management efforts, duly adopted by the Councils and of benefit to the resources throughout the region, may be frustrated and fulfillment of the overall MFCMA objective of full utilization of the Nation's fisheries may be impeded.

III. THE INAPPROPRIATENESS OF APPLYING FEDERAL CONSISTENCY IN THE FMP CONTEXT

There are a number of compelling reasons to conclude that application of Section 307(c)(1) to the FMP process provides little positive benefit and has many serious drawbacks. Most importantly, these reasons relate to: (a) the unique nature of FMP decisionmaking; (b) the regional nature of the management regime and the resource to be managed; and (c) the international dimension of fisheries management.[9]

(a) The Unique Nature of FMP Decisionmaking.—Fishery management decisions are effectively made by the Councils which, in the first instance, develop FMPs and their implementing regulations. The Councils are a "unique form of government". They are not composed of federal bureaucrats in Washington, D.C. distant from the managed resource and unfamiliar with local concerns. Rather, they consist of representatives from the States, appointed by the Secretary of Commerce, based upon recommendations made by the State governors. In addition, "the principal State official with marine fishery management responsibility and expertise in each constituent State" (MFCMA, Section 302(b)(1)(A)) is a voting member of each Council. FMPs, moreover, are only developed after extensive public hearings "in the geographical area concerned" (MFCMA, Section 302(h)(3)). And substantively, the MFCMA encourages the Councils to "incorporate . . . the relevent fishery conservation and management measures of the coastal States nearest to the fishery" (MFCMA, Section 303(b)(5)) in each FMP. The entire management framework, in short, was explicitly designed by Congress not only to ensure close coordination among the affected interests closest to the fishery, including the affected states, but, in essence, to vest decisionmaking authority with those interests.[10] Application of Section 307(c)(1) adds extra procedural hindrance to the Councils' operations, without adding anything positive to their deliberations.[11]

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[9] It may also be questioned whether, since the MFCMA is a statute aimed at "conservation" of fishery resources—a goal consistent with the environmental purposes of the CZMA—any one State should be able to elevate its parochial objectives over those embodied in FMPs and so constrain the overall environmentally beneficial operation of the fishery management process. Moreover, because of the dynamic nature of fisheries management, where management measures frequently change to respond to changes in the status of the resource or fishing patterns, management decisions tend not to have the kind of long-term, permanent impacts on development and uses of the coastal zone which might warrant invocation of federal consistency powers.

[10] As Senator Stevens, one of the principal sponsors of the MFCMA stated during the Senate debates in response to criticism from Senator Gravel, "The Senator keeps talking about the Federal Government. This is a regionalization of the 197-mile fisheries zone. * * * We are talking about people who will promulgate regulations for a region. * * * These people are to represent the State and more particularly the fishing interests of the State with regard to conservation principles." *MFCMA History* at 469, *see also, id.* at 460 (the "new management entity . . . is . . . oriented toward local government and not the Federal Government in the first instance"). And only a little more than a year ago, Congress even strengthened the role of the Councils, by eliminating any discretion the Secretary of Commerce may have had to disapprove Council decisions on policy, rather than purely legal grounds. *See* Pub. L. No. 97-453, Sec. 7(a) (January 12, 1983), amending Section 304(b)(2) of the MFCMA.

[11] In point of fact, Congress itself, in enacting the CZMA in 1972, appeared to recognize that interstate or joint State/Federal bodies such as the Councils might be treated differently for

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(b) The Regional Nature of the Management Regime and the Resource to be Managed.—The Councils are dealing with a resource which more often than not migrates through several offshore jurisdictions. They must by law manage that resource "as a unit throughout its range" (MFCMA, Section 301(a)(3)) on a sustainable, long-term basis. They also must manage that resource in a way that is fair, equitable and understandable to the industry. Fishermen of several States themselves often move back and forth across State boundaries in pursuit of their catch. The MFCMA recognizes that it is inappropriate to subject fishermen to a bewildering array of different rules and regulations as they move offshore from one jurisdiction to another. Indeed, the unfairness of such a situation is manifest when one considers that a Florida fishermen fishing for mackerel in a particular area of the FCZ might not be able to use a purse seine net while an Alabama fishermen, fishing in the next boat, would be able to use such gear, and so gain a competitive advantage.

The MFCMA's solution to the problem of assuring beneficial conservation and management of a migratory resource and fostering efficient operation of the fishing industry is its system of "regional management". Indeed, one central purpose of the MFCMA was to provide consistency in the management of resources migrating through several jurisdictions. Its purpose in this regard was precisely to remove fisheries management from overlapping and conflicting State rules and vest management decisions instead in a regional body with a regionally-based perspective. It would be wholly incongruous if, through the backdoor mechanism of federal consistency, this purpose were frustrated.

In fact, the practical vices of subjecting fisheries management decisions to federal consistency are readily apparent:

First, from the perspective of the beneficial use of the resource, it would be counterproductive. For example, a single State often has only limited resources from a particular fish stock within its jurisdiction. Consequently, it often wishes to limit the harvest of that resource in order to preserve the maximum catch for its citizens. However, the resource as a whole, viewed as a unit throughout its range, is often healthy. In such circumstances, imposition of single State catch limitations would not only be unwarranted in terms of the overall health of the stock and its productive and beneficial use, but would actually work to frustrate the full utilization objectives of the MFCMA.

Second, from the perspective of rational management, it would be essentially unworkable. In the Gulf of Mexico, for example, FMPs cover areas in the FCZ off five states—Florida, Alabama, Mississippi, Louisiana, and Texas. It is impossible for an FMP and its implementing regulations to be consistent with the varying laws of all the coastal states: the State of Florida may have a five inch limit for snapper, the State of Alabama a seven inch limit, the State of Mississippi a nine inch limit, and so forth. If FMPs and their implementing regulations had to be consistent with each and every State law, any rational management scheme would simply breakdown.

In short, the requirement of federal consistency makes little sense in the regional scheme of fisheries management established under the MFCMA.

(c) The International Dimension of Fisheries Management.—Finally, there is an important international component to fisheries management. The rules developed by the Councils are not limited in their effect to domestic fishermen. They apply as well to foreign fishermen fishing under international agreement in the FCZ. Representatives of the Department of State sit as non-voting members of each Council and provide foreign policy input to the Councils' deliberations—input ultimately incorporated, as appropriate, in FMPs, which balance foreign policy considerations with domestic management needs. It would be highly inappropriate for individual states, through the mechanism of consistency under the CZMA, to dictate rules for foreign fishermen.

IV. CLARIFYING SOME MISCONCEPTIONS ABOUT THE RELATIONSHIP BETWEEN THE CZMA AND THE MFCMA

In closing, I would like to clarify several misconceptions which seem to have arisen in some quarters with respect to the problems identified and the solutions suggested by SFA:

First, it has been suggested that the problems we cite reflect only a small, parochial issue, involving a single State. It is true that consistency problems in the FMP

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purposes of consistency. Thus, Section 307(e)(1) of the CZMA provides, "Nothing in this chapter shall be construed . . . to displace, supersede, limit or modify . . . the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government. . . ."

process have, to date, largely arisen in Florida. However, the potential for similar conflicts is present in a substantial number of other State programs. More than one-third of the approved State coastal zone management programs (excluding the Great Lakes States) now or will in the future fully incorporate State fishery management laws, while almost one-half dozen other State programs reference specific components of State fishery management authority.[12] If Section 307(c)(1) consistency is made applicable by Congress to the FMP process, then the Florida experience will not be lost on other States, and one can expect that consistency litigation, with all its attendant costs, delay and uncertainty, will begin to mark the fisheries management process around the country.[13] Indeed, it would be only natural that constituent groups disappointed with the outcome of Council deliberations would seek to use every legal measure available, including consistency, to overturn management decisions.

Second, it has been suggested that the problems we cite can be handled "administratively", for example, through the coastal zone management program approval process. Unfortunately, the availability and effectiveness of this option are limited. There are some 27 approved programs outside the Great Lakes, and, as just noted, many of these programs already deal in some way directly with fisheries management. The approval stage, in short, is largely past us. In any case, even if it were possible to re-examine each of these already approved programs, I seriously doubt whether any screening process could detect and eliminate potential fisheries conflicts. Certainly, NOAA cannot reject State programs as not being in the national interest simply because they incorporate fishery management measures. Moreover, as a practical matter, it is impossible to tell at the program approval stage what kinds of consistency problems will or will not arise in the future. The future is too uncertain, and none can predict today what management regimes for fisheries a Council might deem appropriate tormorrow.

Third, it has been suggested that, in order to maintain the integrity of the CZMA, it is necessary that all federal activities which directly affect the coastal zone be subject to consistency and that differential treatment of fisheries would create a "loophole" which would allow other activities, perhaps of greater concern to coastal managers, to escape consistency review. Contrary to this suggestion, we have faith in the ability of the Congress to make principled distinctions in this area. Our arguments for the differential treatment of fisheries are based upon the unique nature of the MFCMA statutory regime. Based on the kind of statutory distinctions we have suggested, appropriate and discriminating adjustments can be made in the application of consistency. Federal consistency, for all its desirability in certain areas, should not be made into a kind of procrustean bed into which all federal activities must be forced, regardless of the logic or wisdom of doing so.

V. CONCLUSION

In sum, any amendment to Section 307(c)(1) of the CZMA to overturn the Supreme Court's decision in *Secretary of the Interior* v. *California* should not be so broad as to include fisheries management within its coverage. Rather, Congress should affirm that the regional approach to fisheries management embodied in the MFCMA is the correct one and not create artificial and unwarranted hindrances to its operation. SFA believes that such a result is not only in the long-run interest of wise management and conservation of our fisheries resources, but is also fully consonant with an effective partnership among the States and the Federal Government in managing these resources.

Thank you for the opportunity to appear before the Committee today. I would be most happy to answer any questions that you may have.

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[12] Attached at Tab D is a summary of State coastal zone management programs showing the variety of ways in which they deal with the regulation of living marine resouces in the coastal zone. It indicates not only that more than 50% of the approved programs directly touch on fisheries, but that a number of other programs are at least ambiguous on this question, containing provisions, for example, which are generally directed at protection or conservation of coastal ecosystems and resources. Only Washington, North Carolina, Alaska, California and New York would seem clearly not to cover fisheries management in their coastal zone management programs.

[13] Consistency litigation over OCS oil and gas leasing, it should be noted, also began with but a single State, California, complaining.

FEDERAL FISHERY MANAGEMENT PLANS FOR FISHERIES IN THE FEDERAL FISHERY CONSERVATION ZONE—FLORIDA EAST COAST: 3 NM TO 200 NM OFFSHORE, FLORIDA WEST COAST: 9 NM TO 200 NM OFFSHORE VERSUS FLORIDA STATUTES, CHAPTER 370 SALTWATER FISHERIES, HOUSE NATIONAL RESOURCES COMMITTEE, LIVING RESOURCES OVERSIGHT, SEPTEMBER 1983

The Magnuson Fishery Conservation and Management Act of 1976 (FCMA) established eight regional councils to be charged with management of the fisheries resources located in a federal Fishery Conservation Zone (FCZ). This zone extends from the seaward edge of state territorial seas out to 200 miles. The Act also mandated the preparation of fishery management plans in order to establish and maintain optimum yield for the important fisheries in the zone.

Florida's territorial seas extend to 3 nautical miles on the east coast and 9 nautical miles on the west coast. Two councils manage the FCZ off of Florida: the South Atlantic Council and the Gulf of Mexico Council. These two councils have addressed about a dozen specific fisheries so far—four plans have been implemented: Shrimp, Spiny Lobster, Stone Crab, and Coastal Pelagics (Mackerel); the others are in stages of review or preparation. The Secretary of Commerce, acting through the National Marine Fisheries Service, has the ultimate authority to approve or disapprove all plans prepared by the regional councils pursuant to the FCMA. States surrounding the area the plans apply to, the fishing industry, the consumer, and recreational and environmental organizations all participate in the development of the plan. The fisheries plans have jurisdiction only within the Federal Conservation Zone; state law prevails in the territorial seas.

In Florida, the Statutes contain specific regulatory measures used to manage fishery resources. The legislature has passed detailed statutes for fisheries resources statewide, as well as special laws applicable to particular counties. Conflicts with the federal plans have arisen in that the Florida Statutes dealing with Saltwater Fisheries extend jurisdiction to fishermen and vessels of the state "within or without the boundaries of state waters" (Florida Statutes, 370.02(2)) and in some cases regulate gear use within and without state waters. Notable instances of this type of statutory provision are Florida Statutes 370.1105 regarding prohibition of landing and sale of finfish taken with traps, and Florida Statutes 370.08 dealing with restrictions on purse seins and nets used for taking mackerel. The federal plans here directly conflict with state law, and preemption of state law is implied when an Act of Congress is in actual conflict with the law of a state.

In some instances the statutes regulating only in Florida's territorial seas differ from the management measures set forth in the federal plans. Since fish do not observe territorial boundaries, these differences are the basis for law enforcement problems and confusion for fishermen. In several of these conflicting areas, the Saltwater Fisheries Study and Advisory Council made recommendations to change Florida law to dovetail with the federal regulations. Some of these changes appeared this past session in HB 285, known as the "Species Bill". The bill did not pass the legislature. Many of the changes are non-controversial and are considered by the Department of Natural Resources (DNR) to be positive changes, and in the best interest of the fisheries involved. These include sports fishermen's season on spiny lobster, wringing of lobster tails, shrimping area closures, and billfish bag limits.

Other areas of direct disagreement, namely the purse seining of mackerel and fish trap restrictions, are areas in which DNR is challenging the management measures and implementation of the federal plans. DNR has filed suit to enjoin the implementation of the mackerel plan, and the matter is now before the courts. The Snapper-Grouper plan for the Atlantic and the Reef Fish plan for the Gulf both allow fish traps, with certain restrictions. These two plans, scheduled to be implemented soon, will also most likely be challenged in court by DNR.

The new Marine Fisheries Commission created by this legislature in 1983 now has the authority to address these discrepancies through the rule-making process, and the statutes involved are scheduled for repeal as laws over the next three years. However, if the Marine Fisheries Commission does not address these issues by the repeal dates, the statutes shall remain in force until such time as appropriate rules are developed.

Some of these issues may necessitate legislative action sooner than their scheduled repeal dates. I will be working with DNR and the new Marine Fisheries Commission to determine if any of these statutory conflicts are creating such law enforcement or management problems as to necessitate legislative action sooner than their scheduled date.

This committee may also want to address the topic of the state regulating fisheries outside of Florida waters, and of prohibiting Florida citizens and vessels operat-

ing outside Florida's territorial seas from using certain fishing techniques and gear which will be allowed under the federal plans to the citizens of other states. The Marine Fisheries Commission will be able to promulgate regulations but they must be consistent with Florida Statutes.

Following are tables detailing the specific federal fishery plans and noting areas of agreement and areas of conflict with Florida Statutes.

COASTAL MIGRATORY PELAGICS

[King Mackerel, Spanish Mackerel, Cobia]

Fishery management plan measures—implemented Feb. 4, 1983	Florida statute law—scheduled for repeal July 1985
King Mackerel:	
A. Potential time and area restrictions to be implemented by the Secretary of Commerce as contingency measure for resolving gear and user group conflicts.	
B. Potential separation of hook and line and net vessels in the FCZ off the counties of Indian River and St. Lucie by establishment of zones.	
C. Total annual allowable catch (July 1–June 30) of 37 m lbs. Recreational—28m. Commercial—9m. hook and line gear—3.877m. net gear—5.122m.	370.08(11) Prohibition on taking and landing of King mackerel so taken with a gill net of more than 200 meshes of 4¾" stretched mesh. Applies to waters in any country bordering Atlantic, except Monroe.
D. Minimum mesh size of gill nets 4¾ inches stretched [1]	370.08(12) Prohibition on use of net with mesh size less than 4¾" .[1]
E. Measures for National Marine Fisheries Service implementing recreational bag and size limits and commercial trip limits if need arises.	370.11(2)(a)4. 12-inch size limit.
F. Annual harvest by purse seine gear allowed up to 400,000 lbs. in South Atlantic and 400,000 lbs. in Gulf. National Marine Fish Service observers required on board.[2]	370.08(3). Prohibits use of purse seines for taking of food fish within or without State waters.[2]
Spanish Mackerel:	
A. Potential time and area restrictions to be implemented by the Secretary of Commerce as a contingency measure for resolving gear and user group conflict.	
B. 12-inch fork-length size limit. Catch allowance of 5 percent by weight of undersize fish.[1]	370.11(2)(a)4. 12-inch fork-length size limit.[1]
C. Total annual allowable catch of 27m lbs.	
D. Measures for NMFS to implement recreational bag limit or commercial trip limit if need arises.	
E. Annual harvest by purse seine gear of 300,000 lbs. in Gulf and 300,000 lbs. in South Atlantic. NMFS observers required on purse seine vessels.[2]	370.08(3). Prohibits use of purse seines for taking of food fish within or without State waters.[2]

COASTAL MIGRATORY PELAGICS—Continued

[King Mackerel, Spanish Mackerel, Cobia]

Fishery management plan measures—implemented Feb. 4, 1983	Florida statute law—scheduled for repeal July 1985
Cobia—A. 33 inch fork length minimum size.	

[1]Areas of agreement.
[2]Areas of conflict.

SPINY LOBSTER

Fishery management plan—implemented June 30, 1982	Florida statutes—scheduled for repeal July 1986
A. Minimum size limit of 3" carapace or not less than 5.5" tail length.[1]	370.14(2)(a). Minimum size limit of 3" carapace or 5.5" tail length.[1]
B. Closed season April 1–July 25; 5-day soak period of July 21–25 and a 5-day grace period for trap removal April 1–5.[1]	370.14(4). Closed season April 1–July 25.[1] 370.14(3). 5-day soak period prior to open season; 5-day grace period after close of season for trap removal.[1]
C. All traps have degradable surface of certain size. Spears and hooks prohibited. Traps worked in daylight only.[1]	370.14(3)(a). Traps must have biodegradable surface. No spears, grabs, or hooks. Traps worked during daylight hours only.[1]
D. All lobsters less than legal size immediately returned to water. No more than 3 live shorts per trap or 200 per license.[1]	370.14(3)(i). Licenseholder may possess shorts upon payment of $250 bond; not exceeding 200 per license or 3 per trap.[1]
E. No regular season recreational limit. 2-day recreational season on the weekend prior to July 21. Catch limit of 6 per person or 24 per boat per day.[2]	370.14(3)(g). Regular season recreational limit of 24 per day.[2] 370.14(6). Sports fishermen's season on July 20–21. 6 per day bag limit.[2]
F. No molestation of females or stripping of eggs. Berried females returned to water immediately.[1]	370.14(2)(c) and (d). Egg-bearing females protected.[1]
G. Use of poisons or explosives prohibited.[1]	370.08(5) and (10). Use of poisons or explosives prohibited.[1]
H. Mandatory reporting via trip tickets for commercial lobster fishermen.	
I. Traps, gear, and boats identified by number and color code.[1]	370.14(3)(b) and (c). License required per boat; traps, buoys, and boat marked with license.[1]
No regulations on separation of tail from body at sea. (wringing)[2]	370.14(2)(b). Wringing of tail from the body prohibitied except by special permit.[2]

[1] Areas of agreement.
[2] Areas of conflict.

SHRIMP

Fishery management plan measures—implemented May 15, 1981	Florida statutes—scheduled for repeal July 1, 1986
A. Permanent closure of "Tortugas Shrimp Sanctuary" to protect small pink shrimp.[1]	370.151 Tortugas shrimp bed areas closed to shrimping except live bait production.[1]

SHRIMP—Continued

Fishery management plan measures—implemented May 15, 1981	Florida statutes—scheduled for repeal July 1, 1986
B. State consider establishment of shrimp management sanctuaries in important nursery areas.	370.15, .151, .153, .155, .156, .157. Open and closed areas set for Tortugas, Monroe County, Cedar Key, Cape St. George, Escambia Bay and Bay County, Florida East Coast Shrimp Bed, St. Johns River. Some areas closed by sampling, some by date. Bait shrimping allowed in closed areas for food shrimping. Some areas in St. Johns River closed to live bait shrimping. Trawling mostly limited to daylight hours. 370.15(7)(a)2. Live bait shrimping limited to no more than 5 pounds of dead shrimp per vessel per day.
Use area closures based on biological sampling rather than count laws, to protect small shrimp.[2]	370.15(2) Shrimp count law—illegal to take "small shrimp" or "prawn"—defined as those that require more than 47 with the heads to make a pound, or 70 without heads to make a pound. (Franklin County 55 with heads/pound; 85 headless/pound.) [2]
C. States encouraged to adopt flexible management procedures for regulation by administrative agencies.	
D. Gulf states encouraged to adopt reciprocal internal management decisions to allow joint management of shrimp with other states and the Department of Commerce.	
E. Educational program for shrimpers regarding sea turtle protection.	
F. Encourage development of gear to reduce incidental catch of finfish.	
G. Seasonal closure of portion of the Dry Tortugas shrimp grounds to avoid gear conflict with stone crab fishermen.	
H. Gulf Council will attempt to reduce loss of trawlable bottom by the monitor and review of the construction of offshore artifical reefs.	
I. Mandatory statistical reporting requirements.	

[1] Areas of agreement.
[2] Areas of conflict.

STONE CRABS

Fishery management plan measures—implemented Sept. 30, 1979	Florida Statutes—scheduled for repeal July 1984
A. Minimum claw size of 2¾ inches.[1]	370.13(1)(b). Minimum claw size of 2¾ inches.[1]
B. Declawed crab bodies returned to water [1] and not landed. Live crab holding box must be shaded.	370.13(1)(c). Illegal to possess or transport intact stone crab or stone crab bodies.[1]

STONE CRABS—Continued

Fishery management plan measures—implemented Sept. 30, 1979	Florida Statutes—scheduled for repeal July 1984
Illegal to pull another person's traps.[1]	370.13(2)(k). Illegal to molest another's traps, buoys, or lines.[1]
C. Season closed between May 15 and October 15.[1]	370.13(1)(a). Season closed between May 15 and October 15.[1]
Grace period for trap placement and recovery (10 days before and 5 days after open season).[1]	370.13(2)(b). Grace period for trap placement and recovery (10 days before and 5 days after open season).[1]
Traps may be pulled only in daylight hours.[1]	370.13(2)(f). Traps worked during daylight hours only.[1]
D. Degradable panel required in nondeteriorating [1] traps.	370.13(2)(a). Traps required to have biodegradable section.[1]
E. Data collection procedures by sampling.	370.13(2)(d). Specific marking of boats and gear required. Permits issued.
F. Closed Areas—Establishment of a shrimp/stone crab harvest separation line to resolve territorial conflict. Snipe Point to Ft. Myers area.	

[1] Areas of agreement.

SOUTH ATLANTIC SNAPPER-GROUPER COMPLEX

Fishery management plan—implementation expected in near future	Florida statutes—Scheduled for repeal July 1985
A. Methods of evaluating overfishing of individual species.	
B. Methods to evaluate future minimum sizes on other species or changes in minimum sizes.	
C. 4-inch trawl mesh size to achieve 12-inch minimum for vermilion snapper.	Chapter 81-267 Moratorium on roller net trawl fishing except shrimp.
D. 12-inch minimum sizes for red and yellowtail snapper.	
12-inch minimum size for red and nassau snapper.[1]	370.11(2) 12-inch minimum size for grouper.[1]
E. 8-inch minimum for black sea bass.	
F. Use of fish traps prohibited shoreward of the 100 ft. contour, south of Fowey Rocks Light (Miami). Otherwise traps allowed.[2]	370.110 Fish traps prohibited for finfish (with exception of crab, crawfish, shrimp, pinfish, or black sea bass traps of specified size).[2]
G. Pulling fish traps prohibited during night south of Cape Canaveral.[2]	
H. Fish traps must have degradable panels and doors. Minimum mesh size established.[2]	
I. Coding and numbering of traps, buoys, and vessels required for vessels fishing traps.	
J. Use of poisons and explosives prohibited.[1]	370.08(5) and (10). Poisons and explosives prohibited.[1]
K. Spearing of jewfish prohibited.	370.172 Spearfishing prohibited in certain waters of the upper Keys.
L. Method for prohibition or restraint of specific gear from artificial reefs.	

[1] Areas of agreement.
[2] Areas of conflict.

GULF REEF FISH

[Snappers, groupers, and sea basses]

Fishery management plan—implementation anticipated in next 6 months	Florida statutes—scheduled for repeal July 1985
A. Prohibit power heads, roller trawls, and fish traps in specified stressed area of Gulf waters.	
B. Traps allowed. Degradable panels/doors required on traps. Sizes specified.[2]	370.1105 Fish traps prohibited.[2]
C. Each vessel limited to 200 traps.	
D. No poisons or explosives.[2]	370.08 (5) and (10). Poisons and explosives prohibited.[1]
E. Snapper size limit of 12 inches.	370.11(2)(a)8. 12-inch fork length minimum for grouper.
F. Permit all fish trappers. Traps, gears, and vessels required to be marked.	
G. Statistical reporting system developed.	

[1] Areas of agreement.
[2] Areas of conflict.

CORAL

Fishery management plan—near implementation	Florida statutes—scheduled for repeal July 1984
A. Prohibits taking or destruction of stony coral, fire coral, or sea fans.[1]	370.114 Prohibits collection or destruction of stony corals, fire corals, and sea fans; except for permitted taking for scientific or educational purposes.[1]
B. Establishes permit system for taking for scientific or educational purposes.	
C. Incidental catch of coral returned.	
D. Use of toxic chemicals in coral areas prohibited.[1]	370.08(10) Use of toxic chemicals prohibited.[1]
E. Identification of threatened habitats for corals and designation as areas of special concern.	

[1] Areas of agreement.

BILLFISH

Fishery management plan—under review	Florida statutes—scheduled for repeal July 1985
Bag limit for recreational fishermen of one sailfish, one spearfish, and one blue or white marlin per person per day. Unlimited catch and release.[1]	370.11 (5) and (6). Sale of sailfish prohibited. Possession limit of two. Unlimited catch if fish are immediately released.[1]
Permit required for longlining in Federal Conservation Zone (FCZ). Certain areas closed to foreign longline fishing at specific times.	

BILLFISH—Continued

Fishery management plan—under review	Florida statutes—scheduled for repeal July 1985
Incidental catches of billfish must be returned to water.	
If bycatch reaches 10 percent of optimum yield, Secretary of Commerce may institute protective measures of quotas, closures, or gear restrictions.	
Billfish taken in a directed fishery only by means of rod and reel.	
Data collection system to be developed.	

[1] Areas of conflict.

TAB B

FEDERAL CONSISTENCY LITIGATION IN FLORIDA

(1) *Department of Natural Resources v. Southeastern Fisheries Association, Inc.*, 415 So. 2d 1326 (Fla. 1st DCA 1982), *appeal docketed*, No. 62-288 (Fla. Sup. Ct.) (Snapper-grouper/use of fish traps).

(2) *Union Norman Bethell v. State of Florida, Department of Natural Resources*, No. 82-1516-Civ.-JWK (S.D. Fla., Sept. 29, 1983), *appeal docketed*, No. 83-3727 (11th Cir.) (Snapper-grouper/use of fish traps).

(3) *Southeastern Fisheries Ass'n, Inc. v. Livings*, No. 83-524-Civ.-SMA (S.D. Fla., March 7, 1983) (Mackerel/use of purse seines).

(4) *State of Florida v. Baldrige*, Civ. No. 83-7071 (N.D. Fla., March 9, 1983) (Mackerel/use of purse seines).

(5) *Livings v. Davis*, 422 So. 2d 364 (Fla. 3d DCA 1982), appeal pending, (Fla. Sup. Ct.) (Snapper-grouper/use of fish traps).

TAB C

STATE OF FLORIDA,
DEPARTMENT OF NATURAL RESOURCES,
Tallahassee, Fla., February 23, 1983.

Mr. ROBERT P. JONES,
Executive Director, Southeastern Fisheries Association, Inc., Tallahassee, Fla.

Dear Mr. Jones: Pursuant to your letter dated February 22, 1983 requesting information reference our Department's enforcement policy on king mackerel net laws, please be advised as follows:

Florida Statute 370.08(11) states that "No person may take king mackerel from the waters within or without this state in any country bordering on the Atlantic Ocean, except Monroe County, or land any king mackerel so taken with a gill net having a hanging depth of more than 200 meshes of 4¾-inch stretched mesh, measured from the cork line to the lead line or its equivalent. Possession of such a net is prima facie evidence of a violation of this subsection."

It is the intent of the Florida Marine Patrol to enforce this law.

I appreciate your concerns and your desire to assist your members in complying with our resource laws. If I may be of additional assistance, please advise.

Sincerely,

D. N. ELLINGSEN,
Director, Florida Marine Patrol.

TAB D

MEMORANDUM—STATE COASTAL ZONE MANAGEMENT PROGRAMS AND THE FISHERY MANAGEMENT PROCESS

State coastal zone management programs ("CZMPs") deal in a variety of ways with the regulation of living marine resources in the coastal zone. Because of the vagueness of some programs, it is not always possible to tell with precision how a

particular state's CZMP will apply to fisheries management. Indeed, it took more than a year of discussions between the Department of Commerce and the State of Hawaii to finally resolve the question of whether the Hawaii CZMP applied or did not apply to the harvest of coral and spiny lobster. Nevertheless, CZMPs would, for the most part, appear to fall into one of three categories in the way in which they deal with fishery management issues:

1. A number of CZMPs now or will in the future fully incorporate state fishery management laws or otherwise reference specific components of state fishery management authority;

2. There are other CZMPs whose direct application to fishery management is uncertain; and

3. There are CZMPs which do not appear to cover fishery management at all.

A review of current CZMPs, excluding the Great Lakes states, reveals the breakdown set forth below. More than half of the approved CZMPs—some 15 programs—presently or will in the future incorporate fisheries laws or otherwise touch in some direct way on fisheries management. Moreover, all CZMPs contain provisions relating to uses in the coastal zone which may impact fisheries indirectly, i.e., provisions restricting or promoting certain kinds of development in certain areas.

I.—PRESENT OR FUTURE INCORPORATION OF OR SPECIFIC REFERENCE TO STATE FISHERY MANAGEMENT LAWS IN CZMPS

1. *Connecticut.*—The Connecticut CZMP provides for full application of existing regulatory controls over coastal resources, including three laws directly related to fisheries: (1) shellfisheries—C.G.S. Secs. 26-187 to 26-237; (2) shellfish sanitation—C.G.S. Sec. 19-55; and (3) fisheries and game laws—C.G.S. Secs. 26-1 to 26-180. See Connecticut CZMP at II-195, D-5.

2. *Florida.*—The Florida CZMP incorporates in toto chapter 370 of the Florida Statutes, which regulates the saltwater living marine resources of the State. See Florida CZMP at II-34.

3. *Maine.*—The Maine CZMP incorporates fully the Maine Marine Resources Management Law (12 M.R.S.A. 3504), which "provides for the protection of all renewable marine resources, including fish [and] shellfish". See Maine CZMP at 84, 153-154.

4. *New Hampshire.*—The New Hampshire CZMP specifically covers all state authorities related to the management of marine fisheries under the jurisdiction of the Fish and Game Department, including regulations concerning finfish, lobster and crabs. See New Hampshire CZMP at 3-6 to 3-7.

5. *Rhode Island.*—The Rhode Island CZMP provides preservation and conservation of all natural resources within the coastal zone, including those related to the State's living marine resources. See Rhode Island CZMP at 68, 262, 270.

6. *Guam.*—The Guam CZMP makes subject to management "all activities that are under the authority of any terrority agency". See Guam CZMP at 89. These include activities involving the taking of fish and game under the jurisdiction of the Department of Agriculture pursuant to G.C.G. 12301-12321. See id. at 91.

7. *Maryland.*—The Maryland CZMP provides for future development and implementation of management plans for living aquatic resources of Maryland's coastal areas. See Maryland CZMP at 117, 120.

8. *Mississippi.*—The Mississippi CZMP reserves a section for fisheries management ordinances upon codification, in order to carry out the policies of the program. See Mississippi CZMP at VIII-2 and VIII-38.

9. *American Samoa.*—The American Samoa CZMP states that the Office of Marine Resources is presently developing a "comprehensive fisheries management plan" which will incorporate CZMP policies. See American Samoa CZMP at 30. Moreover, the American Samoa CZMP includes as one of its objectives the promotion of "fisheries development in a manner consistent with sound fisheries management". See American Samoa CZMP at 161.

10. *Northern Mariana Islands.*—The Northern Mariana Islands CZMP states that the Commonwealth will "become more involved in the planning for responsible management in the development of fishery resources". See Northern Mariana Islands CZMP at 179.

11. *Alabama.*—The Alabama CZMP lists "commercial fishing" as a use subject to the management program. See Alabama CZMP at 72.

12. *Oregon.*—The Oregon CZMP states that fish and wildlife production and utilization are uses to be managed. See Oregon CZMP at 17. The program references the obligation of the State Fish Commission to "study the fishery within the zone and

where appropriate adopt, amend or repeal all rules and regulations. . . ." See Oregon CZMP at 273.

13. *Pennsylvania.*—The Pennsylvania CZMP contains several provisions relating to the maintenance, enhancement and study of coastal fisheries and, further, specifically mentions as an authority to be "utilized in carrying out the policies of Pennsylvania's . . . program" the state's comprehensive fish laws of 1959, 30 P.S. 51, et seq. See Pennsylvania CZMP at II-2-12 to II-2-16; II-A-1, II-A-16-17.

14. *Delaware.*—The Delaware CZMP refers to coastal waters as resources subject to management, and sport and commercial fishing are included as coastal water uses. See Delaware CZMP at 5A. 3-3, 5A. 3-14.

15. *Virgin Islands.*—The Virgin Islands CZMP states that fishing is a use subject to management and of the highest priority in open waters. See Virgin Islands CZMP at 79, 81.

II.—CZMPS WITH UNCERTAIN APPLICATION TO FISHERIES MANAGEMENT

1. *Hawaii.*—The Hawaii CZMP underscores the State's general policy of protecting coastal ecosystems. See Hawaii CZMP at 88.

2. *Louisiana.*—The Louisiana CZMP sets forth general policies and guidelines providing that uses and activities need to be performed in such a manner that will avoid "reductions in the long term biological productivity of the coastal ecosystem". See Louisiana CZMP at 53-55.

3. *Massachusetts.*—The Massachusetts CZMP includes a Memorandum of Understanding with the Department of Fisheries, Wildlife and Recreational Vehicles stating that such Department intends to "adopt and incorporate the rules and regulations promulgated by the Secretary for implementation of the program". See Massachusetts CZMP at A-13.

4. *New Jersey.*—The New Jersey CZMP generally requires that there be "minimal, feasible interference . . . to the natural functioning of marine fish and fisheries. . . ." See New Jersey CZMP at 217.

5. *South Carolina.*—The South Carolina CZMP "network[s] [the Council's] authority with every State agency which exercises relevant statutory authority within the coastal zone." See South Carolina CZMP at V-37. It states as an objective the reduction or elimination of activities "which would have a significant negative impact on wildlife and fisheries resources. . . ." See South Carolina CZMP at III-51.

6. *Puerto Rico.*—The Puerto Rico CZMP states that the Commonwealth of Puerto Rico is in the process of seeking to unify fishing-related programs in a single entity. See Puerto Rico CZMP at 136.

III.—CZMPS WHICH DO NOT APPEAR TO COVER FISHERIES MANAGEMENT

The following States do not appear to cover fisheries management in their CZMPs: Washington, North Carolina, Alaska, California and New York.

The CHAIRMAN. Thank you.

Mr. Gutting.

Mr. GUTTING. Thank you, Mr. Chairman. I am Richard Gutting, vice president of Government for the National Fisheries Institute. The institute is one of the older and largest of the organizations representing the U.S. fishing industry. Our 1,300 members come from all facets of the industry, including the harvesting, processing and marketing sectors. The trouble with going second, particularly when you go behind Eldon Greenberg, is that you find yourself with very little to say.

I would, however, like to depart from my testimony and make a few points to amplify on the points that Eldon has just made. First, our position is identical to that of the Southeastern Fisheries Association. Our opposition to the bill is centered on its potential impact on the fishery management process under the Magnuson Act, which up to now has been regulating the offshore fisheries off our coast.

We are very concerned about the impact the coastal zone planning process might have and has had upon the integrity of the de-

cisionmaking of the regional fishery management councils. In surveying our members, Mr. Chairman, the concerns for the fishery management process are not centered in Florida where up to now we have had the most serious litigation. Throughout the country in our membership you can find individual members who are disgruntled over this decision or that decision that the regional councils have made.

I know, as you well know, in the fishing business it is kind of hard to find a consensus.

The CHAIRMAN. I was going to say I am not sure I would find very often a decision that is agreed to by the fishing industry.

Mr. GUTTING. Exactly. The thing that makes the fishing council work is that everyone is in it together by a majority vote. The fishermen are on the councils, the States are on the councils, one Federal official is on the councils. They know that if they are to come up with management plans, there has got to be a majority view, a majority vote. It is that in-it-togetherness in the council system that has made the system work. It has been quite a remarkable feat. Compare where we were in fishery management in 1976 versus where we are today. We have over 26 plans in place today and another 26 or 27 under way in just a brief period of time.

There was wisdom in Congress, I think, in setting up that delicate balance that you find in the councils this balance has made the system go.

Where we are today, I believe, is at a threshold. We have one State, the State of Florida, which has decided to incorporate all of its State laws into its coastal zone plan. It has stood up after two councils have decided on a particular harvesting strategy, and said that it, a single State, cannot go along with that plan because its State laws are to the contrary. We are now in court.

Now, in the fishing business everybody watches everyone else. Everybody is looking at the State of Florida. The outcome of that litigation, I think, could spell the end of the regional system. It could open up once again the possibility that States would be going to court seeking to block the regional plans that have been hammered out, compromised, and voted on in this process.

We are not talking about a system of the Federal Government issuing permits and licenses and making decisions. We are talking about a system where States are full participants in a process. It is a unique system. I think because of the nature of the resources, the nature of the user groups, and certainly because of the nature of the system that Congress constructed in 1976, that a special provision, special consideration should be given to the way we manage fisheries.

For that reason, sir, we come to you asking that in thinking about this bill, you think about the fisheries as a unique case.

Thank you.

The CHAIRMAN. What is the matter with the suggestion that the Secretary of Commerce could overrule State disagreements with Federal consistency as far as it relates to fishing and you count the management councils as a Federal agency?

Mr. GUTTING. First of all, I do not think that if you asked the councils they would quite characterize themselves as a Federal

agency. I think they like to think of themselves in terms of a regional decisionmaker.

The CHAIRMAN. I meant Federal in the sense they are federally created

Mr. GUTTING. That is certainly true.

The CHAIRMAN. But they come up with the decision that is alleged to be consistent with the region where they are managing, some State for whatever reason does not like it, and the fisheries are not excluded. They say, well that particular decision of the Pacific council is not consistent with Oregon's management plan.

Mr. GUTTING. Yes.

The CHAIRMAN. That is then appealed to the Secretary of Commerce, and the Secretary of Commerce says consistency goes both ways. In this case, Federal consistency is a regional management plan and the State cannot preempt that.

Mr. GUTTING. If we were assured that would be the kind of result we would get——

The CHAIRMAN. You can never guarantee what results you are going to get, but I understand the fear that you have. There is lots of jealousy between the States, even those that are governed by one council, as you are well familiar, and there is a certain fear that a State might exercise its land, its coastal zone land consistency claim in favor of its people involved in fishing to the detriment of the regional plan.

Mr. GUTTING. Yes.

The CHAIRMAN. I understand that fear.

Is that a sufficient reason to reject it totally, or that you simply say the Department of Commerce can overrule that kind of a decision?

Mr. GREENBERG. I do not see that the legislation that has been introduced provides for the Department of Commerce overruling.

The CHAIRMAN. No, I think that that suggestion has been made.

Mr. GREENBERG. It does seem to me the way consistency has worked is that the Federal entity is supposed to be consistent with the State programs. The problem is there is not just one State that is involved here, there are a number of States. Mr. Ross mentioned that Oregon is concerned about its fisheries and the Pacific council. There are other States that have incorporated their fishery management laws as well in their coastal zone programs.

Our concern, although the problem has been largely limited to one State, is that the precedent is being set in that State, and the use of consistency is being seen as a mechanism for the States—or disgruntled constituencies, because individual fishermen who may not like a council decision can raise consistency as well—to overturn those council decisions.

The thrust of the CZMA is to give the States influence and control over Federal decisionmaking. Our argument is that that influence and control is there under the Magnuson Act as enacted in 1976. What Federal consistency adds is a kind of club that you hand to the disgruntled member.

The CHAIRMAN. Basically what you are saying is fishing in this sense is different from everybody else because there are no regional councils that manage oil drilling or manage dumping hazardous wastes or manage dumping something else.

Mr. GREENBERG. I cannot think of another regime under a Federal statute that is comparable to that established under the Magnuson Act.

The CHAIRMAN. Well, you present a good case. I do not know where I will come down on that. I have ambivalent feelings on both sides. I hate to make exceptions because I know other groups are going to come in and say well, we are different. My 15 years experience of dealing with businesses and other communities in this country is that each of them are in favor of something uniformly good for the Nation, but there is something different about them and that they must be treated differently than everything else or everybody else. They mean it in all good faith. There is nothing malicious or even hypocritical about it. I understand their feelings. They are very close to that forest, and those are the trees they see and that is the area they work.

Mr. GREENBERG. Mr. Chairman, if I could respond to that, I think Congress in 1972 when it enacted the Coastal Zone Management Act—and obviously it was not contemplating the Magnuson Act at that point—recognized that where you have regional bodies or interstate bodies, bodies consisting of persons representing the views of those in the States, or interstate compacts, those might be treated differently for purposes of consistency. There is a somewhat ambiguous provision in the CZMA, section 307(e), which refers to the intent of Congress not to diminish the authority of these regional bodies. I think there was a recognition that when you have a regional body with State representation, you do not have the same kinds of problems that you have when you are dealing with the secretary of some department or the administrator of some agency in Washington who is distant from the interests of the State and distant from the resource and the impacts on the resource.

The CHAIRMAN. A point well taken, gentlemen. Thank you.

I appreciate it.

This will conclude our hearing on the bill.

[Whereupon, at 11:05 a.m., the committee recessed subject to the call of the Chair.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

Statement of Hon. Paula Hawkins, U.S. Senator From Florida

The State of Florida and Florida delegation members have a legitimate interest in the way Federal agencies carry out activities that directly affect our coastal resources.

Passage of Senate Bill No. 372, a bill amending section 301(c)1 of the Coastal Zone Management Act of 1972, is necessary in order to restore to coastal States the right to meaningful participation in the planning of Federal activities that affect our coastal resources.

Florida's pristine coastal waters and wetlands, teeming with wildlife, present one of the major attractions to millions of visitors to Florida each year. These visitors support a tourist industry that brought $23 billion in revenue to the State of Florida in 1983. Millions were spent on sport fishing and diving. Millions more were spent in hotels, restaurants, theatres, tackle shops—all small businesses—all heavily dependent on the ability of their elected representatives to maintain the environmental and aesthetic integrity of the Florida shoreline.

I believe that off-shore mineral exploration and other Federal activities that affect State coastal resources can be accomplished in ways that adequately protect those resources. This cannot happen, however, if State governments are frozen out of the Federal resource planning process. If the January 11, 1984 Supreme Court decision is allowed to stand, Senators and Congressmen from coastal States will have no choice but to remain involved in the day to day, and month to month discussions going on between State natural resource agencies and Federal agencies. I feel that the public would be much better served if S. 372 were passed, thereby putting the State agencies on equal footing with the Federal agencies with regard to coastal programs and eliminating the need to resolve these issues in the congress.

This bill could also reduce the amount of litigation between the States, industry and the U.S. Government, as well as reduce the costs of the few inevitable conflicts that do arise in our courts.

I have reviewed the industry arguments that suggest that consistency requirements are more effectively applied in the case of mineral exploration after the leases have been sold by the Federal Government. That course of action does not appear to me to be the most economical with regard to time or money. Consider the case where a successful state challenge to a proposed exploratory well site (a challenge based on the State's coast zone management program) makes it necessary for the Federal Government to reimburse the disappointed oil company not before, but after that oil company has spent $1 to $5 million on the lease sale and thousands more preparing his exploration plan. Who wins in this situation? It's not the U.S. Government. It's not the oil company—and it's certainly not the public. It seems that both our national security and our States' coastal zones would be better served if consistency based objections were raised and resolved before rather than after Federal leases are sold.

This legislation will also be of great importance in relation to on-shore activities and new off-shore mineral exploration efforts involving such things as under-sea phosphate and gravel deposits. Such projects are already underway off the coasts of Oregon and California.

It is with great pleasure and relief that I say that Secretary of the Interior William Clark has done everything in his power to alleviate State concerns over Federal OCS policy. If all coastal State senators could say with confidence that Secretary Clark's policies would continue long after he has left that office, it could be argued that there is no need for this amendment. Yet nothing can change the fact that the Supreme Court's January 11, 1984 decision places all coastal State's rights under the Coastal Zone Management Act in jeopardy. For that reason, this proposal deserves the support of all on this panel and that of all my colleagues in the Senate.

STATEMENT OF HON. PETE WILSON, U.S. SENATOR FROM CALIFORNIA

Mr. Chairman, I appreciate the opportunity to appear before the committee today to speak on an issue that had its genesis in my home State of California. were it not for the recent Supreme Court decision in *U.S.* v. *California* that determined a consistency review by the Federal Government was not required at the leasing stage of OCS oil and gas development, we would not be here today to discuss proposed amendments to the Coastal Zone Management Act. I am encouraged by the swift action this committee has taken to deal with this issue and hope that we will have time in this crowded session to pass out legislation which will have the effect of reversing this Court decision.

At issue in proposed amendments to the CZMA is whether affected coastal States should be afforded direct input into the preparation of an OCS oil and gas lease sale. The administration tells us that it already has the authority to consult with States under section 19(e) of the Outer Continental Shelf Lands Act, and therefore amendments to CZMA are unnecessary. Secretary Clark stated in a recent letter of March 24 that even though this authority under section 19(e) may not have been utilized in the past, he intends to take "new initiatives" in this regard and enhance communications with affected State entities on OCS development.

While I welcome Secretary Clark's initiatives, I would submit that this is not enough: another less sensitive and less conscientious Secretary of Interior might well take a different view of his responsibilities to work with State governments. If all congress had intended was to have States "consulted" in the process of developing the OCS, passage of the CZMA would never have been required. Consistency review under the terms of the CZMA goes beyond consultation authorized by OCSLA. It should permit State governments direct input into the decision making process to the extent that the proposed lease sale may initiate a chain of events that directly affects the State's territorial sea.

The need for a consistency review at the leasing stage is to resolve potential conflicts between State and Federal entities at the earliest possible stage of OCS development.

I think a review of the record will reveal that in California, the State Coastal Commission has succeeded in resolving potential conflicts at the exploration and development stages. Why not expand this problem-solving ability to the pre-leasing period?

Two distinct advantages will follow. First, it would seem that we would be doing the oil companies a favor by letting the States identify problem areas before the companies submit bids that can run higher than $200 million for a single tract.

Secondly, we would be doing the taxpayer a favor. Presumably, assurance that development of a given tract is consistent with a coastal zone management plan will make the value of that tract higher, returning more money to the U.S. Treasury.

For these reasons, a consistency determination should be required at the leasing stage of OCS oil and gas development. I am aware that the bill presently being considered by this committee speaks to other issues as well in the implementation of the CZMA, but I would reserve comment on these proposed changes until a later date. I would only ask that the committee continue to consider improvements in the pending legislation that would more narrowly define that CZMA jurisdiction landward of the State's territorial sea, improve the mediation process presently used in Federal/State disputes, and lift the consistency review requirement for exploration permits if we are going to require it at the leasing stage.

Again, thank you for this opportunity and I look forward to reviewing in detail the testimony that the committee is prepared to hear today.

STATEMENT OF HON. EDWARD M. KENNEDY, U.S. SENATOR FROM MASSACHUSETTS

Mr. Chairman, I am an original cosponsor of S. 2324 and I appreciate the opportunity to testify in support of this bill. Our legislation would amend the Coastal Zone Management Act of 1972 (CZMA) to reverse the Supreme Court's recent 5–4 decision in *Secretary of the Interior* V. *California.* S. 2324 clarifies the "federal consistency" provisions of section 307(c)(1) of the CZMA and restores to the section the meaning Congress originally intended, and that which the courts have repeatedly affirmed until the Supreme Court decision. The Court decided—mistakenly in my view—that the CZMA "consistently" provisions do not apply to federal activities such as Outer Continental Shelf (OCS) oil and gas leasing activities that can affect the coastal zone from outside its boundaries. This geographical intrepretation is neither consistent with our original management rationale nor supported by the plain language of the statute which reads:

"Each federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs."

We enacted the CZMA in 1972 because we recognized that many of the important and fragile natural resources of this nation's coastline were being lost to the demand of population growth and economic development. Congress believed that the best way to achieve the national goal of effectively managing coastal resources was to give states the major role in developing and administering management programs. Section 307(c)(1) was originally included to encourage state participation by mandating a working relationship between states and federal agencies that gave the states real input in the shaping of federal policies that could affect the coastal zone.

Congress has substantively amended the CZMA three times and I played an active role in these debates on the Senate floor. Whenever the issue of "consistency" was reconsidered, we reaffirmed our commitment to its principles as conceived in the original act. We never found it advisable or necessary to change even a single word of the original "consistency" provision.

We also left no doubt—in my opinion—as to the application of the "consistency" requirements to OCS leasing activities. Just four years ago, when the CZMA was reauthorized, this Committee reported that it found "no justification to depart" from the view that "the Department of Interior's activies which preceded OCS lease sales were to remain subject" to the CZMA consistency requirements. I see no reason today, Mr. Chairman, to accept the modification of our policy which results from the Supreme Court decision. Passage of S. 2324 would lay to rest the confusion which has blossomed regarding out intent in this matter.

If the Supreme Court decision is allowed to stand, the policies of Jim Watt, the most anti-environment Secretary of Interior in history, will carry the force of law. The effects, Mr. Chairman, will not be confined to OCS leasing. This decision has far-reaching implications for many other federal activities that may adversely affect our coastal areas. Under the decision, states have no statutory basis for challenging federal actions as long as they take place outside the geographical boundries of the coastal zone—no matter how devastating their effects on coastal lands or water resources. Such federal activites already under consideration include ocean dumping of radioactive wastes, at-sea incineration of toxic PCBs, and seabed strip mining.

I disagree with those who claim that Section 19 of the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA) is an adequate substitute for Section 307(c)(1) of the CZMA. The two laws have fundamentally different purposes and complement each other. Under Section 19 of the OCSLAA a governor is not required to consider the policies of the state's coastal management program when making recommendations on a lease sale. Thus it is quite possible that the national policy goals of the CZMA as implemented in federally-approved state management plans would not be considered in shaping oil and gas leasing plans.

S. 2324 clarifies the "directly affecting" language of Section 307(c)(1) in two important ways. First, it reaffirms the understanding Congress arrived at more than a decade ago that no magic wall exists three-miles offshore to protect our coastal areas from the negative consequences of federal activities conducted in waters farther offshore. We recognized that it should be the effects of federal activities on the coastal zone, rather than where these activities are carried out, that detemine whether states should have real input under CZMA. Second, it makes clear that the consistency provisions are meant to reach those federal activities, such as OCS leasing, which initiate a chain of events which can result in an impact on coastal resources.

As a Senator from Massachusetts, I fully appreciate the need to secure new sources of energy to bolster our economy and national security. S. 2324 will not delay offshore oil and gas development. S. 2324 does *not* grant states new authority over federal activities which directly affect the coastal zone, but it does affirm the rights of states under the CZMA to become involved in decision-making at the earliest opportunity. I believe, Mr. Chairman, that is is only at the early stages of planning, before large amounts of public or private resources are commited, that a federal/state partnership can be truly effective in heading off disputes. The evidence I have seen indicates that the CZMA "consistency" provisions have worked well in encouraging cooperation and coordination between states and the Federal Government.

Mr. Chairman, S. 2324 is critically needed to restore the balance Congress intended to the federal/state partnership we constructed in the CZMA. I believe that passage of S. 2324 will allow us to get on with the prudent development of our OCS and coastal resources in the spirit of true and effective state/federal partnership. I urge

the Committee to move forward expeditiously on this important and necessary legislation.

STATEMENT OF WESTERN GOVERNORS' ASSOCIATION ON BEHALF OF THE GOVERNORS OF ALASKA, ARIZONA, COLORADO, HAWAII, IDAHO, MONTANA, NEVADA, NEW MEXICO, OREGON, UTAH, AND WYOMING

AMENDMENTS TO THE COASTAL ZONE MANAGEMENT ACT

Over the period of the last fourteen years the process of federal/state joint decisionmaking on public lands issues has been appreciably strengthened. These developments have been extremely important to western states where 95 percent of all federal lands are located. We have worked long and hard to ensure that national and state needs are balanced in all decisions regarding federal lands and resources.

Since 1978 the western governors have been actively involved in helping to develop the administrative rules for the Federal Land Policy and Management Act (FLPMA). Of particular concern to us are the land use planning provisions of FLPMA. As the planning regulations have been revised over the past five years we have repeatedly sought a strengthening in the requirement for consistency between federal plans and those of state and local government. Throughout that process the Coastal Zone Management Act, and the strong decisionmaking role it provides for states, has served as an important model.

It was with great concern therefore that we received the news of the Supreme Court's decision in the case of *Secretary of the Interior vs. State of California* in January. On a 5/4 vote, the Court ruled that federal leasing of outer continental shelf tracts need not be consistent with the affected state's federally approved coastal zone management plan. The western governors feel this decision represents a significant step backward in the development of federal/state cooperative land use policies.

Each state's coastal zone management plan is a reflection of the careful deliberation of the citizens and elected officials of that state. The development of the plan provides a forum for the discussion and involvement of local, state, and federal concerns. It reflects the balanced desire for progress and preservation. The Western Governors' Association does not believe that the ruling of the Supreme Court reflects the will of the Congress on the issue of consistency of federal actions with established state plans.

The Western Governors' Association believes that *all* federal activities should continue to be consistent with an affected state's land management plans. The governors therefore support legislation that will clarify the Coastal Zone Management Act to ensure consistency of federal actions, including leasing decisions, with a state's coastal zone management plan.

STATEMENT OF HON. THOMAS H. KEAN, GOVERNOR, STATE OF NEW JERSEY

Thank you for the opportunity to offer comments on S. 2324, a bill which has bipartisan support, including that of New Jersey's Senator Lautenberg. The bill would amend the federal Coastal Zone Management Act in response to the Supreme Court's recent decision in *Interior* vs. *California* concerning Outer Continental Shelf lease sales. New Jersey supports offshore exploration for oil and gas so long as it is conducted in an environmentally sensitive manner. I believe that the federal consistency process, as outlined in the Coastal Zone Management Act and the legislation to amend it that has been proposed, can be a very effective tool to ensure that OCS activities are conducted properly.

New Jersey has been an active participant in the OCS program since the mid 1970's when the first lease sale was held in the Mid-Atlantic. In all but one case, the State has worked successfully with the Department of Interior to define the size, timing and location of lease sales.

In July 1982, I filed suit against then-Secretary of the Interior Watt over the terms of OCS Reoffering Sale No. 2. The Department of the Interior had refused to delete seven tracts out of a total of 155 Mid-Atlantic tracts to be offered in the sale. Of seven, five were located at the heads of submerged canyons, which are simply too valuable and too sensitive for leasing. The other two were known to produce a significant portion of New Jersey's tilefish catch. The Department of the Interior also refused to invoke a biological stipulation in the proposed sale to protect sixteen other tracts identified by the New Jersey Department of Environmental Protection as significant fisheries areas. After lengthy negotiations with Interior that ultimate-

ly proved unsuccessful, my only recourse was to file suit to protect New Jersey's nearly $1 billion commercial and recreational fishing industry.

The federal District Court in Trenton ruled in September 1982 that the consistency provisions of the federal Coastal Zone Management Act do not extend to economic impacts on the coastal zone such as the harm to New Jersey's fisheries beyond New Jersey's territorial waters, that could result from offshore leasing, exploration, and development. New Jersey has appealed this ruling to the Third District Court of Appeals. However, the Supreme Court's recent decision in *Interior* vs. *California* probably will lead to dismissal of the New Jersey suit on the threshold issue—that OCS lease sales are not subject to the federal consistency provisions of the federal Coastal Zone Management Act.

For these reasons, I strongly support the proposed legislation (S. 2324) which would, once and for all, overturn *Interior* vs. *California* and clarify that "identifiable physical, biological, or economic consequences in the coastal zone" are within the preview of the federal consistency process. I believe that the leasing process sets in motion a chain of events that can almost inevitably result in development and production. Consequently, the state's interest must be safeguarded at every link in the chain, especially at the lease sale stage.

I also strongly believe that this legislation is necessary to affirm the rights that the states believed they had to control activities that affect their coastal zones. However, I am concerned that the bill grants exceptions to the federal consistency requirement that are too broad and which may negate the bill's purpose. Specifically, I believe the bill should be amended to narrow the circumstances of national emergency and national security in which the federal consistency requirements may be overlooked. For example, another oil crisis, such as we experienced twice in the 1970's, will very probably be a national emergency which would lead to overlooking the federal consistency requirements for OCS lease sales and other OCS activities, the very situation that we want to avoid.

Finally, I am encouraged by Secretary Clark's recent announcement that the department intends to work more closely with states in defining the terms of OCS lease sales. Secretary Clark has promised to use the next Mid-Atlantic lease sale, Sale 111 scheduled for June 1985, as the textbook example of the implementation of the new procedures to address state concerns early in the planning process. I look forward to working with Secretary Clark on Sale 111; however, the role of New Jersey and other states will be strengthened in the negotiations with the Department of Interior if legislation is passed which will reverse the Supreme Court's decision.

STATEMENT OF THE ALASKA OIL AND GAS ASSOCIATION

The Alaska Oil and Gas Association (AOGA) is a trade association whose member companies account for the majority of oil and gas exploration, production and transportation activities in Alaska. AOGA is very concerned by the reasoning and potential effects of S. 2324. While AOGA supports the comments presented by the American Petroleum Institute and the Western Oil and Gas Association, it is also essential that the particular concerns relevant to Alaska be expressed.

We understand S. 2324 to be a reaction to the recent Supreme Court Decision in *Secretary of the Interior* v. *California*. It has been represented that without the near veto power over federal actions accorded to the coastal states by S. 2324 that the existing state/federal cooperation and concern for coastal envirionments will break down, with the result of irreparable harm to the coastal zones of affected states.

AOGA believes that this representation reflects a serious misunderstanding of the existing checks and balances presently in place. Further, the authority proposed to be granted the states by S. 2324 could severely shift the balance of power in decisions of national concern, potentially allowing highly parochial concerns to detemine issues of national interest.

Specifically, in the area of oil and gas leasing on the Outer Continental Shelf adjacent to Alaska, there are numerous opportunities for the state, local communities, and concerned citizens to influence the scope and manner in which federal resources, held in trust for the nation, are or are not offered for lease.

The Outer Continental Shelf Land Act (OCSLA), the Coastal Zone Management Act (CZMA), and the National Environmental Policy Act (NEPA) have struck a delicate balance between national and state interests regarding the needs for exploration and development of the OCS and protection of the coastal zone of the adjacernt states. Section 18 of the OCSLA allows states the opportunity to communicate any concerns or desires to the Secretary of the Interior during the formulation of the

five-year OCS leasing schedule. Without formal identification on this schedule no area can be offered for sale. As Congress ultimately reviews this schedule, the Secretary's response to any issues of state concern is a matter clearly available for review and action by Congress as may be appropriate in the national interest.

Section 19 of the OCSLA provides the states additional opportunity to participate in OCS policy and lease sale planning decisions. Governors are permitted to submit recommendations to the Secretary regarding the size, timing, or location of OCS lease sales. The Secretary must then balance the state concerns and the national interest.

Additionally, the states as well as local communities have the opportunity to influence both the five-year leasing program and individual lease sales through participation in the extensive public comment and Environmental Impact Statement (EIS) process. Illustrative of this point is the process surrounding a recent lease sale in Alaska where seven specific opportunities to comment were provided to all interested parties. This process is accumulated as follows:

Request for Resource Reports: Coordination with government agencies, industry and the general public began in December, 1978. At this time, Resource Reports were requested from all federal and state agencies with expertise pertinent to the sale area.

Call for Nominations and Comments: In April, 1979, a Call for Nominations and Comments was issued, requesting expressions of industry interest in tracts within the call area. Comments were requested on environmental issues related to oil and gas leasing in the area. Responses were received from oil companies and numerous state and federal agencies, conservation groups, and individuals.

Public Scoping Meetings: Fourteen scoping meetings were held in March and April of 1980 in various communities and villages to gather first-hand scoping input. A letter campaign to 56 federal and state agencies, 38 special interest groups and 145 letters to village governments and village councils of the Calista region encouraged participation in the scoping meetings and solicited written comments.

DEIS Development: Federal, state and local agencies, industry, and the public were consulted during the DEIS development. Published in June, 1981, the DEIS formulated descriptive information identifying significant impacts and issues and identified effective mitigating measures and reasonable alternatives to the proposal.

DEIS Public Hearings: Public hearings were conducted in August and September, 1981 in several communities and villages to receive comments on the DEIS. Public hearings were held in Savoonga, Unalakleet, Nome, Koklik, Emmonak, Bethel, and Anchorage.

DEIS Written Comments: Written comments concerning the DEIS were solicited and incorporated into the FEIS.

FEIS Consultation: Federal, state and local government agencies, academic institutions, industrial firms, special interest groups and private citizens were consulted prior to and during preparation of the FEIS.

Reference to the above-mentioned list of contacts (villages, individuals, etc.) is provided in the appendices of the Norton Sound DEIS and FEIS. These opportunities for input represent only a first step in a long process towards the potential production of hydrocarbons from the proposed sale area. During exploration and possible development, several more opportunities to address public concern are available.

Moreover in Alaska the time in which potential oil and gas prospects can be identified, and ultimately brought to production, if commercial, is extended—allowing still greater opportunity for the state and local community to express any concerns and reach an understanding for safe and prudent exploration and development of resources.

Specifically, the Alaskan development timeline is extended by weather conditions and environmental considerations. Further, the remote nature of almost all potential lease areas and the lack of existing industrial/commercial infrastructure or proximate transportation facilities also lengthens the time in which otherwise routine activities can be accomplished. Because of these factors, along with substantial regulatory and environmental obligations, it takes an estimated 13 years to bring a typical commercial deposit of hydrocarbons in Alaska to production. This protracted time line follows the schedule set out below:

From date of lease issuance, *one initial year* is typically spent acquiring exploration plan approval and associated permits. Thereafter, at least *two years* will be devoted to exploratory drilling. In the event of a discovery up to *four years* of delination drilling could be required. Concurrently, both conceptual and detailed engineering design work along with extensive environmental studies, reports, and an impact statement are completed. During this time the development plan will be filed and all major permits necessary to establish the infrastructure required for actual pro-

duction will be acquired. Finally procurement, construction and installation of production facilities will probably require another *six years* prior to first production. Included in this time period would be development drilling, continued detailed engineering, and then production start-up.

The sum of these periods is 13 years.

The inclusion of a near veto power for the coastal states to dictate what areas are offered for lease, and on what terms, would not materially increase the environmental safeguards already offered in the above enumerated process.

Local communities and districts in Alaska are implementing District Coastal Management Plans for incorporation into the Alaska Coastal Management Program. Under regulations recently adopted by Governor Sheffield, local districts with approved coastal management programs, are presumed to have expertise in the interpretation of their plans as they apply to determining the consistency of any activity affecting such Districts. The state coordinating agency is further directed to give due deference to any concerns expressed by the District. Accordingly, under this regulatory approach by the state, federal leasing decisions are likely to become subject to local concerns without reference to national needs or objectives.

The United States Geological Survey has estimated that the Alaska OCS may contain from one-third to two-thirds of the undiscovered petroleum reserves to be produced from the total Outer Continental shelf. These estimates are set forth in Geological Survey Circular 860 entitled "Estimates of Undiscovered Recoverable Conventional Resources of Oil and Gas in the United States " (see attached page 2 which is an excerpt from USGS Circular 860). Resource estimates of this magnitude are obviously of great importance to national security and future energy needs. The decision to lease, or on what terms to lease these resources, should not be left to local planners.

AOGA further believes that concerns over a breakdown in cooperation or understanding between the coastal states and the federal government is unwarranted. In recent decisions by Secretary Clark many of the concerns expressed by Alaska's Governor Sheffield were recognized and acted upon despite the fact that the state did not hold a veto power over federal OCS leasing decisions.

In summary, S. 2324 would do far more than merely reverse the recent Supreme Court decision in *Secretary of the Interior* v. *California*. The legislation represents a fundamental departure from the delicate balance between local, state and national interests which has been long recognized by the Congress and upheld by the courts since the enactment of the Outer Continental Shelf Lands Act in 1953. The real issue is whether the federal government or the State of Alaska, and potentially impacted communities, should be in the position to be able to balance potential conflicts in determining national policy for developing new energy sources.

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Figure I-1

From Gulf of Alaska/Cook Inlet Lease Offering (October 1984) DEIS

Lease Offering
Secretary of Interior Decision Final Notice of Lease Offering
Governor's Comments to Proposed Notice
Proposed Notice of Lease Offering
Final Environmental Impact Statement
Public Review of Draft EIS
Draft Environmental Impact Statement
Secretary of Interior Decision - Area Identification
Call For Information
Scoping Alternatives Mitigating Measures Issues of Concern
Resource Reports Requested
Note...Points of Public Involvement.

STEPS IN THE LEASING PROCESS

TABLE 1.—PRODUCTION, RESERVES AND ESTIMATES OF UNDISCOVERED RECOVERABLE RESOURCES OF CRUDE OIL, NATURAL GAS, AND NATURAL GAS LIQUIDS FOR THE UNITED STATES

[All tabulated values are rounded numbers; therefore, values for production and reserves and for means of undiscovered resources, all of which are additive, may not be precisely so. Negl., negligible, less than or equal to 0.05 billion barrels of oil or 0.05 trillion cubic feet of gas; NA, not applicable; NE, not estimated]

Area	Cumulative production [1]	Identified resources [1]			Undiscovered recoverable resources		
		Measured reserves [2]	Indicated reserves	Inferred reserves	Low F_{95} [3]	High F_{5} [3]	Mean
Crude oil (billion barrels)							
Onshore:							
Alaska	1.2	8.7	0	5.0	2.5	14.6	6.9
lower 48 States	111.4	15.9	3.6	16.8	36.1	62.0	47.7
Entire onshore	112.6	24.7	3.6	21.8	41.7	71.0	54.6
Offshore:							
Alaska [4]	.7	.2	0	.1	4.6	24.2	12.2
Lower 48 States	7.5	3.0	Negl.	1.4	8.7	25.1	15.8
Entire offshore	8 2	3.1	Negl.	1.5	16.9	43.5	28.0
Entire United States	120.7	27.8	3.6	23.4	64.3	105.1	82.6
Natural gas (trillion cubic feet)							
Onshore:							
Alaska	1.2	30.0	NA	4.4	19.8	62.3	36.6
lower 48 States	519.3	123.3	NA	132.1	288.6	525.9	390.2
Entire onshore	520.6	153.3	NA	136.5	322.5	567.9	426.8
Offshore:							
Alaska [4]	.6	2.0	NA	1.2	33.3	109.6	64.6
Lower 48 States	56.8	36.3	NA	39.8	66.1	148.2	102.4
Entire offshore	57.5	38.2	NA	41.0	117.4	230.6	167.0
Entire United States	578.0	191.5	NA	177.5	474.6	739.3	593.8
Natural gas liquids (bilion barrels)							
Entire United States	19.1	5.7	NA	4.8	NE	NE	17.7

[1] Cumulative production and reserves are as of Dec. 31, 1979. Production reserve figures were derived from API and AGA data (American Petroleum Institute, American Gas Association, and Canadian Petroleum Association, 1980), except for California where production and reserve data were taken from the California Division of Oil and Gas (1980) and the U.S. Geological Survey (Kalil, 1980).

[2] Does not include gas in storage.

[3] F_{95} denotes the 95th franctile; the probdability of more than the amount F_{95} is 95 percent. F_5 is defined similarly. Fractile values are not additive.

[4] Includes quantities considered recoverable only if technology permits their exploitation beneath Arctic pack ice—a condition not yet met.

Source: Excerpt USGS Circular 860.

STATEMENT OF EXXON CO., U.S.A.

Exxon Company, U.S.A. appreciates the opportunity to submit the following comments for inclusion in the record of the Senate Committee on Commerce, Science and Transportation hearing in regard to S. 2324, a proposed amendment to the Coastal Zone Management Act of 1972. We are concerned that the Committee and a substantial portion of the Congress do not fully appreciate the negative impacts that this legislation can have on oil and gas exploration and development. A clearer understanding of Outer Continental Shelf (OCS) petroleum operations would obviate concerns about potential or imagined impacts and lead to a recognition that offshore exploration and development have been and will continue to be conducted with no substantial adverse effects upon either the marine or coastal environments.

Exxon is firmly opposed to the passage of S. 2324 because it is both unnecessary and counterproductive. We believe concerns about the impact of OCS leasing and development which the legislation attempts to address are largely unfounded; this conclusion is based on several decades of offshore oil and gas exploration and production experience. Moreover, some of the provisions in this legislation could halt or substantially delay OCS leasing and development to the detriment of U.S. energy consumers and national security.

Exxon has extensive experience in U.S. Outer Continental Shelf (OCS) petroleum exploration, development and production operations, having been a participant in the very first OCS lease sale, off the coast of Louisiana in 1954. We are among the leading oil and gas producers in the Gulf of Mexico, the world's most highly developed offshore area. Exxon is also the leading oil producer in the Pacific OCS. We have been active in the exploration of every OCS area that has been opened for leasing since the commencement of the leasing program in 1954. This activity illustrates our high degree of commitment to the oil and gas potential of the OCS and to exploration and development of our nation's OCS resources in an environmentally sound manner.

Timely OCS development vital to U.S. energy security

In 1971, the United States' proved oil and gas reserves were at an all-time high level, reflecting the inclusion that year of the large reserves that had been discovered at Prudhoe Bay on Alaska's North Slope. In the twelve years since then, with record drilling levels both for exploration and development throughout the United States and equally remarkable efforts on the part of the nation to conserve its petroleum energy, U.S. proved reserves of oil have dropped 25 percent. U.S. gas reserves are down 30 percent. Simply stated the nation is depleting its inventory of known oil and gas reserves at a much faster rate than new reserves are being found.

Exxon believes that our best chance of slowing this rate of reserve depletion is by expeditiously exploring and developing what may be our nation's greatest undeveloped asset: its Outer Continental Shelf. Our geologists have estimated that the OCS may contain as much as two-thirds of the remaining undescovered oil in the United States and one-half of the remaining undiscovered gas. These undiscovered resources play a key role in our energy future. We anticipate that half of the oil and gas produced in the United States in the year 2000, just sixteen years away, will come from fields that have not yet been discovered. Therefore, the United States has a vital stake in the undeveloped areas of the Outer Continental Shelf.

Act of leasing has no impact on the coastal zone

The historical record shows that lease sales, in and of themselves, have no effect on land or water uses in the coastal zone. Any effects that may result will occur at the stages of exploration and development. However, activities at these later stages, to the extent they affect land or water uses in a state's coastal zone, are already subject to the exhaustive review requirements of either Coastal Zone Management Act (CZMA) Section 307(c)(3)(A) (federal licenses and permits) or Section 307(c)(3)(B) (exploration and development plans), as applicable. In addition, the review requirements of the National Environmental Policy Act and Outer Continental Shelf Lands Act may apply. As evidenced by the following discussion, further review is completely unwarranted.

Lease sales in undrilled frontiers and previously unproductive areas are most likely to produce nothing more than exploratory activity, which is transitory by its very nature, and leaves no mark of its passage on the ocean or the coastal zone. Of the fourteen general OCS lease sales held through 1980, ten resulted in nothing but either dry holes or only minor accumulations that were too small to develop. Petroleum accumulations are relatively rare occurrences in the earth's crust; they are also difficult to find.

The discovery of economic petroleum accumulations in an offshore area does trigger activities which have some impact on the coastal zone even though actual drilling and production may be remote from the coastline. Offshore petroleum development brings capital expenditures for onshore plants and equipment, taxes on property and sales, and jobs along with their associated wages and purchases of goods and services. Following onshore construction and offshore placement of platform and production equipment and development well drilling, which can last for 5 to 15 years, offshore wells begin producing oil and gas. Thus a stable economic base remains throughout the development and production phases, providing communities with an unexpected and welcome source of taxes, wages, and demand for goods and services. In addition, all of these activities and their associated impacts on land or water uses in the coastal zone will have been reviewed under Section 307(c)(3)(A) or Section 307(c)(3)(B) of the CZMA.

On a broader scale, another highly beneficial aspect of OCS oil and gas development is the fact that it typically produces the public's oil and gas at a real resource cost that is substantially below the cost of imported oil. Bonuses, royalties and taxes paid to the federal government and the costs associated with developing and producing OCS oil and gas represent payments into the American economy for goods and

services. Conversely payments to foreign oil producers for imported oil constitute a drain on our economy and a major source of our balance-of-trade deficits.

OCS oil and gas exploration and development to not adversely impact the environment

The record clearly shows that offshore oil exploration and development is conducted in a clean and environmentally sound manner. From 1971 through 1982, industry drilled 12,000 wells in federal offshore waters in the Gulf of Mexico and produced 4 billion barrels of oil from those areas. During all of that activity, there were only a total of some 68,000 barrels spilled in 55 incidents. The amount of oil spilled over this time of intense industry activity amounted to a little more than one-thousandth of one percent of the oil produced in federal offshore leases. During this same period, natural seeps in the Coal Oil Point area off the coast of California are estimated to have released 242,000 barrels of oil into the Santa Barbara Channel. Clearly, the adverse impact of energy operations on the OCS are vastly overstated.

States have adequate protection without this legislation

Activities described in exploration or development plans which will affect land or water uses in the coastal zone are already subject to state consistency review and approval pursuant to Section 307(c)(3)(B) of the CZMA. Before engaging in exploration, a lessee must file an exploration plan with the Department of Interior with a certification that all of the lessee's described activities which will affect land or water uses in the coastal zone will be consistent with coastal zone management plans of affected states. The plan and certification are subject to consistency review by the affected states before exploration can begin. Once a discovery is made the lessee must submit a detailed development and production plan. The lessee describes those activities which will affect land or water uses in the coastal zone and certifies that they will be conducted in a manner consistent with the affected states' coastal zone management plans. The Secretary then is required to submit the plan and the lessee's certification to the affected states. Subject to review by the Secretary of Commerce, the state must conclusively concur with the lessee's consistency certification before development can commence. Thus affected states are assured that they will remain in the review process for every step of OCS petroleum exploration and development.

Conclusion: S. 2324 should be rejected

Most of the remaining undeveloped offshore areas will require long lead times because of the depth of water, remoteness or the hostility of the environment. Thus, any additional delays of OCS lease sales will further aggravate the problems of America's decreasing petroleum and continuing high volume of oil imports. The gap between what we can produce and what we use will grow.

Exxon urges you to reject this and any other legislation that unnecessarily delays the exploration and development of the United States' undiscovered energy resources. The petroleum industry has demonstrated that it can develop these resources in a manner that is compatible with the marine and coastal environments. Congress should take actions that will allow industry to identify America's petroleum legacy and make it available to satisfy the energy demands that will challenge our nation in the years ahead.

PACIFIC SEAFOOD PROCESSORS ASSOCIATION,
Washington, D.C., March 16, 1984.

Hon. BOB PACKWOOD,
Chairman, Senate Committee on Commerce, Science, and Transportation, Dirksen Senate Office Building, Washington, D.C.

DEAR CHAIRMAN PACKWOOD: I am writing on behalf of the Pacific Seafood Processors Association with regard to S. 2324, to amend the Coastal Zone Management Act of 1972. PSPA would appreciate the inclusion of this letter in the March 28 hearing record for this legislation.

It would appear that the definition of "directly affects the coastal zone" in the proposed Section 307(c)(1)(B) would include decisions made by the regional fishery management councils under the Magnuson Fishery Conservation and Management Act ("MFCMA"). I believe that the inclusion of fishery management decisions under the consistency provisions of the Coastal Zone Management Act would be counterproductive and would result in a serious impediment to the orderly fishery management process. As you are aware, the MFCMA provides a balance between the fish-

ery management activities of the states and of the federal government. In our opinion, including fishery management decisions in S. 2324 would upset this balance.

In light of the above, PSPA would respectfully request your assistance in exempting regional fishery management council decisions from the provisions of S. 2324. We understand a hearing on the bill is scheduled for March 28 and are thus sending a similar letter to Chairman Packwood to include in the hearing record.

Please let me know if I can provide any further information. Thank you for your consideration.

Very truly yours,

ROBERT F. MORGAN, *President.*

NORTH PACIFIC FISHING VESSEL OWNERS' ASSOCIATION,
Seattle, Wash., March 23, 1984.

Hon. BOB PACKWOOD,
Chairman, Senate Commerce, Science, and Transportation Committee, Dirksen Senate Office Building, U.S. Senate, Washington, D.C.

DEAR SENATOR PACKWOOD: For the record, the North Pacific Fishing Vessel Owners' Association would like to reiterate it's concerns [illegible] S. 2324. As we have commented in the past (please see enclosed correspondence) we are concerned about the impact this legislation could have on our North Pacific crab and trawl fisheries.

As Chairman of the Commerce, Science, and Transportation Committee we encourage your support of an amendment which would exempt fisheries under the Magnuson Fishery Conservation and Management Act (MFMCA) from a consistency review. Thank you for your consideration and we would also like to submit the enclosed correspondence as part of the hearing record.

Sincerely,

BARRY D. COLLIER,
Executive Director.

Enclosures.

NORTH PACIFIC FISHING VESSEL OWNERS' ASSOCIATION,
Seattle, Wash., March 8, 1984.

Hon. BOB PACKWOOD,
U.S. Senate,
Washington, D.C.

DEAR SENATOR PACKWOOD: The North Pacific Fishing Vessel Owners' Association understands that you have recently introduced legislation which would require federal actions seaward of states' jurisdiction to be consistent with the Coastal Zone Management Act of 1972.

We are very concerned about the impact this bill could have on the Magnuson Fishery Conservation and Management Act (MFCMA). As you are well aware, the MFCMA has designed to manage this nations fisheries resource in a consistent manner. The regional fishery management Councils were designed to provide this cohesiveness. The potential ramifications of this legislation would be total destruction of the existing Council structure, a Council system which we have been working closely with in the North Pacific.

We appreciate and respect your environmental concerns in offshore waters, specifically issues related to oil and gas development, but see a need for modification of the current bill. Modifications which would allow for fisheries management under the MFCMA to be exempt from a consistency review.

Thank you for your consideration and we appreciate any efforts on your part to ensure the continuation of our Regional Fishery Management Council system.

Sincerely,

BARRY D. COLLIER,
Executive Director.

NORTH PACIFIC FISHING VESSEL OWNERS' ASSOCIATION,
Seattle, Wash., March 8, 1984.

Hon. SLADE GORTON,
Dirksen Office Bldg., U.S. Senate,
Washington, D.C.

DEAR SENATOR GORTON: It is with great concern that we have learned of Senator Packwoods' bill to reverse the recent Supreme Court decision as it affected offshore oil and gas leasing. What probably is a good idea for the states' right's issues in-

volved could very possible wreak havoc with fisheries issues as they are presently mandated under the MFCSA. As you know, we feel strongly that these fisheries issues are presently managed most effectively under the present regime of regional councils and that to allow possible changes to that system under a Coastal Zone Management plan could very possibly disenfranchise many of our Washington State distant water fishermen. As we have just won a lawsuit that dealt specifically with just such discriminatory stances within the State of Alaska, we would certainly be extremely apprehensive as what might happen should that state be given fisheries management under a Coastal Management Zone scheme.

What we feel might be a more workable solution is for fishery issues as regulated under the MFCMA to be excluded specifically from this proposed legislation. This, we feel, would preclude allocation issues becoming a factor in the legislation and still allow Senator Packwoods' concerns as regards the environments to be addressed in meaningful fashion.

Hopefully, our Association will have several representatives to testify, at this important committee hearing on March 29th, but in the interim, we would ask that you work towards accommodating our concerns.

Respectfully,

DENNIS PETERSEN, *President.*

OCEAN SPRAY FISHERIES, INC.,
Seattle, Wash., March 7, 1984.

Senator SLADE GORTON,
Russell Office Building,
Washington, D.C.

DEAR SENATOR GORTON: Please be advised that I am very concerned about Senator Packwood's bill to reverse the recent Supreme Court decision affecting offshore oil and gas leasing. Bluntly put, I fear the legislation would probably result in the MFCMA system of regional management being changed in such a way that would reinstitute a state by state management regime that would severly limit our ability to profitably fish *all* the waters of the FCZ. Should this happen, our distant water crab, trawl and salmon fleets would again suffer under the discriminating systems we have labored so long and hard to change.

I would appreciate your doing whatever is necessary to address my concerns. Perhaps having Senator Packwood exempt MFCMA issues would still allow him to effectively address the issues he feels are important and still safeguard the tenets of our MFCMA fisheries management system.

Respectfully,

DENNIS PETERSEN.

HORIZON FISH CO.,
Corte Madera, Calif., March 11, 1984.

Hon. BOB PACKWOOD,
Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR PACKWOOD: We recently reviewed a copy of the February 22nd press release from your Senate Commerce, Science & Transporation Committee regarding the bill you have introduced to reverse a recent Supreme Court decision affecting oil and gas leasing. We commend your concern and endorse your actions.

We are concerned, however, that the bill, as initially drafted, could have an unintentional and deleterious effect on the management and pursuit of U.S. fisheries—both commercial and recreational. While we have not had opportunity to read the draft of the bill, the press release implies that the States' consistency that you correctly seek for oil and gas would also require similar consistency in fisheries management from three to two-hundred miles.

The broad effect of this would be to immediately and automatically undermine the regional concepts and authorities that we all have worked to hard to impliment consequent of the MFCMA. Here in California the bill, as apparently drafted, would have the bizarre consequence of automatically requiring the closure of numerous fisheries—ones logically prohibited with our three-mile Coastal Zone but viable and vital from the three to two-hundred miles.

We believe that this can be easily corrected by redrafting the bill to either 1) exclude fisheries or 2) include only non-renewable resources.

Thank you for being available to hear our concern, we are confident you will address this matter.

Yours very truly,

HUGH REILLY, *President.*

ROLLINS BURDICK HUNTER,
Seattle, Wash., March 13, 1984.

Hon. SLADE GORTON,
Dirksen Office Building,
U.S. Senate,
Washington, D.C.

DEAR SENATOR GORTON: We have only become aware of Senator Bob Packwood's proposed bill amending the Coastal Zone Management Act of 1972. We fully concur that in certain areas state rights must be respected and we must continue to defend these rights from federal encroachment.

In our opinion, however, any attempt to return a major natural resource such as our fisheries to state management under a coastal management zone scheme could be most detrimental to Washington fishermen. It would appear that the Magnuson Fisheries and Conservation Act has worked satisfactorily to date and should not be altered.

As I am sure you are aware, the fisheries industry is extremely depressed and the individual fishermen should not be subjected to discriminatory elements of various State Department of Fish and Game as has been so prevalent in the past.

We would appreciate you sharing our concern and interest in seeing that the bill be modified in such a manner that fisheries management will continue under MFCMA and be excluded from the current pending legislation.

Sincerely,

RONALD C. EADER, *President.*

MARINE VESSELS MAINTENANCE SERVICES,
Seattle, Wash., March 15, 1984.

Hon. SLADE GORTON,
Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR GORTON: It has recently been brought to my attention that Senator Packwood has introduced legislation that would completely alter the Magnuson Fishery Conservation and Management Act (MFCMA) system of regional management of our fisheries resources.

Senator Packwood apparently has proposed this legislation to address the environmental concerns as they relate to offshore oil and gas leasing but the ramifications of this legislation as proposed would go beyond that problem and create new problems in the fishing industry.

It was the intent of the MFCMA to manage this nations vast fisheries resource in a consistent and effective manner. The regional fishery management councils have strived to provide this consistency of our fishery resources.

While Senator Packwood's proposed legislation addresses an important problem as it pertains to States Rights regarding oil and gas development, it unnecessarily affects the fishing industry. Exempting MFCMA issues from this proposed legislation would allow Senator Packwood's concerns to be addressed effectively and also allow for the MFCMA fisheries management system to continue operating as is.

Thank you for your consideration regarding this matter and would appreciate any effort on behalf of the concerns I have stated above.

Respectfully,

KAREN PETERSEN, *Partner.*

CALIFORNIA COASTAL COMMISSION,
San Francisco, Calif., March 23, 1984.

Hon. ROBERT PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.

DEAR SENATOR PACKWOOD: California Attorney General John Van De Kamp will be appearing before your committee on March 28th to explain why the passage of S. 2324 is both justified and essential. I do not believe it is necessary for me to repeat any of the arguments in favor of this important bill that will be made by the Attorney General, the Coastal States Organization, and other witnesses. Instead, I would like to respond to some of the concerns that have been expressed about S. 2324. Specifically, it has been suggested that California and other coastal states have tried to use their federal consistency authority to block all offshore oil drilling, that it is

unnecessary for coastal states to be involved in oil and gas activities at three different points in the OCSA leasing, exploration, and development process, and that the states could use the consistency authority to block important federal projects hundreds of miles inland.

To respond to these concerns, I would remind you that the passage of S. 2324 not give coastal states any sweeping new authority—it will simply restore the authority that the states have had since the passage of the federal Coastal Zone Management Act (CZMA) in 1972 until the U.S. Supreme Court decision of January 11, 1984 swept much of that authority away. Therefore to lay these concerns to rest it is not necessary to speculate what California and other states might do with the authority to review federal activities outside the coastal zone boundaries. Instead, you can look at what California has done with this authority when it had it between 1977 and early 1984.

To assist you and your colleagues, following is an account of how California has handled the federal consistency issues which seem to be of greatest concern in your consideration of S. 2324. I believe you will find that this information fully demonstrates that any fear that California would abuse its federal consistency authority is not borne out by historical fact.

In brief, the record shows:

The Coastal Commission has agreed with the Interior Department on the appropriateness of leasing ⅔ of the OCS tracts in the Department's plans.

By using its authority to remove from the lease sales the tracts where the subsequent exploration or development activities would pose significant problems, the Commission has provided great investment certainty to the oil industry. When plans of exploration have been filed, the Commission has approved exploratory drilling on every OCS tract which the Commission had reviewed at the lease sale stage.

The Commission has precluded only one OCS tract from being explored at all. The tract was leased before the passage of the CZMA, and the drilling would take place in the Santa Barbara Channel Islands National Marine Sanctuary. The Secretary of Commerce is now considering an oil company appeal of the Commission's decision.

The Commission has agreed with oil companies on their plans for drilling 93 percent of the wells they have proposed. Of the 32 wells the Commission has objected to, all but three have subsequently been dropped from industry drilling plans.

The Commission has reviewed and approved seven exploration and development plans for the installation of ten offshore platforms and related facilities. One of these plans was offered as two options: the Commission concurred with one option and objected to the other.

The Commission has exercised its consistency authority over federal activities inland of the coastal zone only three times, and only when the activity would have had a direct, significant, and serious impact on coastal resources. All three activities were on federal property that is, for the most part, within the coastal zone, but which also extends a short distance inland. In all cases, the Commission approved the activities inland of the coastal zone.

Let me now turn to a more detailed account of the Commission's record. Upon reviewing this record, I am sure you will agree that the Commission has been most prudent and responsible in balancing the positive benefits that offshore drilling would bring in the way of increased domestic energy production against the adverse environmental, social, and economic effects that would result from offshore oil and gas activities.

OCS Lease Sales. Since 1979, the Commission has reviewed five proposals by the Interior Department to offer to lease areas offshore California for oil and gas exploration and development. In these sales, Interior proposed to offer a total of 587 tracts for lease. After careful analysis, the Commission agreed with the Interior Department that fully ⅔ of the tracts (377) should be leased because it appeared that exploration and development of the tracts could take place in a manner fully consistent with California's coastal management program (CCMP). Thus, statements by opponents of S. 2324 that the Commission has used its consistency authority to prevent the leasing of over 80 percent of the California coastline are without merit. The Commission's action on each of these lease sales is summarized below:

Lease Sale 48 (June 1979). On this, the first lease sale reviewed by the Commission after the federal government had approved California's coastal management program, the Commission requested the Interior Department to submit a determination that the lease sale would be consistent with the state's coastal program. The Federal Coastal Zone Management Act of 1972 requires a federal agency to submit to the state coastal management agency a "consistency determination" for any of its activities that will "directly affect" the state's coastal resources. The Interior Department refused because it contended that its lease sale would not directly affect Cali-

fornia. Despite this disagreement over the interpretation of the law, Interior did agree to refrain from offering for sale those tracts where the Commission had found that oil and gas exploration or development would result in insurmountable problems. Interior also agreed to enter into mediation with the Commission over our differences of opinion over the meaning of the phrase "directly affecting". This mediation process is established in the CZMA to resolve disputes between coastal states and federal agencies. Although Interior never formally submitted a consistency determination for Lease Sale 48, the Commission reviewed the revised sale offering and found that sale would be consistent with the CCMP. Thus, the Commission fully agreed with the Interior Department on the lease sale as finally structured. Fifty-one tracts located offshore southern California were ultimately leased.

Lease Sale 53 (May 1981). The effort to resolve the dispute between the Interior Department and the Commission through mediation failed. Therefore, when Interior proposed to lease 111 tracts offshore central California, the Commission again requested a consistency determination. Interior again refused, and this time also refused to delete any tracts. The Commission objected to the leasing of 29 tracts at the northern end of the sale area which are located in the range of the endangered northern sea otter. Interior attempted to push ahead with the sale, so the State of California was forced to file a lawsuit to prevent the leasing of the disputed tracts, and to require Interior to file a consistency determination. An injunction was granted by a federal district court and upheld by the circuit court of appeals; this prevented the tracts from being leased until Interior submitted a consistency determination as required by the CZMA. Bids were received on 74 of the tracts offered; 55 of the bids were accepted. Nineteen bids were offered on the enjoined tracts. Under the recent U.S. Supreme Court decision, Interior is now free to accept the bids and lease these tracts despite the problems that drilling in this area will cause.

Lease Sale 68 (June 1982). Before the legal dispute brought about by the Lease Sale 53 litigation could be finally resolved, Interior again attempted to proceed with a lease sale without filing a consistency determination. The sale area encompassed 164 tracts offshore southern California. The Commission, the Governor, and local governments asked for the deletion of 24 tracts located adjacent to the state's Santa Barbara ecological preserve, at the mouth of Santa Monica Bay, in the shipping lanes at the entrance to the Los Angeles-Long Beach port complex, and offshore heavily used Orange County beaches. Interior refused to delete these tracts so once again the Commission was forced reluctantly to seek an injunction to prevent these tracts from being offered for lease. The federal district court granted the requested injuction. Of the 140 tracts offered for sale, only 29 were leased.

Reoffering Sale 2 (August 1982). A few tracts in the midst of the central California area which had been previously leased remained unsold. Therefore, Interior proposed to reoffer these tracts for sale. Because of their location in an area already subject to heavy exploration along with the availability of onshore support facilities, the Commission fully agreed with Interior on the scope of this sale. Ten tracts were leased.

Lease Sale 73 (November 1983). After three court setbacks, Interior finally submitted a consistency determination for this sale offering. The document was little more than a restatement of Interior's long-held position that the impacts of exploring and developing the area could not be identified at the lease sale stage. However, the Commission was able to identify several problems. In a little over two years, Interior had held four lease sales in this area just offshore Point Conception. Many of the leases sold in the earlier sales remained unexplored. The proper location of onshore processing facilities had not yet been established. A determination had not yet been made as to whether the oil produced would move by pipeline or by tanker. Without this determination, neither the routes of the pipleines nor the locations of the tanker terminals could not be established. All of these problems, in addition to the fact that Interior planned another lease sale in the same area within two years, led the Commission to conclude that this lease sale should be cancelled until the cumulative impacts of all the exploration, development, production, and transportation issues could be resolved. Interior disagreed with this assessment so the Commission sought and received a preliminary injuction ot prevent the leasing of the 137 tracts in this sale. Supreme Court Justice Rehnquist lifted this injunction just before the Court's final decision on the Lease Sale 53 case. Only eight tracts were bid upon and leased.

Plans of Exploration. Under the provisions of the CZMA, individual oil companies are required to file a certification with the state coastal management agency to explain how the company's plan of exploration (POE) for an OCS tract will be consistent with the state's coastal management program. Federal agencies cannot issue approvals to proceed with the exploration until the state has concurred with the POE.

This authority has not been affected by the Supreme Court decision. In fact, the Court relied explicitly on this review to justify its conclusion that state concurrence in a lease sale decision is unnecessary.

Over the past five years, 98 POEs have been submitted for Commission review. Most called for the drilling of several wells and some covered more than one OCS tract. The Commission has concurred with 97 (99%) of these POEs, though in some cases the maximum number of wells has had to be reduced. Of the 432 wells proposed, the Commission has concurred with the drilling of 400 (93%).

Of the 119 tracts covered by these 98 POEs, drilling has been precluded on only one tract by Commission action. That is Union's tract 203 near Anacapa Island which is part of the Channel Island National Park. The drilling would be within the Channel Islands National Marine Sanctuary. The Commission objected to this drilling because the drill ship would be anchored immediately adjacent to the heavily traveled Santa Barbara Channel shipping lane, within a biologically sensitive area, and near the only stable breeding colony of the endangered brown pelican. Union appealed the Commission's objection to the Department of Commerce. After extensive discussions, Union withdrew its appeal and submitted a revised POE which addressed many of the problems the Commission had identified. Depite the revisions, the Commission found it necessary to object to this second POE. Union has again appealed the Commission's decision; the appeal is pending in the Commerce Department.

The Commission also objected to Chevron's POE for tract 205 because the drilling would be adjacent to the Santa Barbara shipping lane. Chevron revised its plan so that the drill ship could be moved away from the vessel lane, included extensive safety features to reduce the potential of collisions, and agreed to participate in a Commission investigation of the reaction of ship masters to a drill ship located close to the traffic lane. The Commission concurred with this amended POE.

The Commission objected to Exxon's POE for tract 467 south of Santa Barbara because the drilling would prevent commercial fishing in this rich fishing area. Exxon appealed this decision to the Commerce Department, but withdrew the appeal and filed an amended POE for only three wells. Exxon plans called for drilling one of the wells during the period of the year when the area was closed to fishing. The Commission concurred with the drilling of this well, but objected to the other two because Exxon would not agree to drill these wells during the non-fishing season. Exxon has appealed this second objection.

All of the POE objections occurred on tracts that were leased before the Commission began reviewing lease sales under its federal consistency authority. The Commission has not found any insurmountable problems that have prevented exploration of any tract that the Commission agreed could be offered for lease. Moreover, of the 432 wells proposed in the POEs, only three remain in contention: Union's well on tract 203 and Exxon's two wells on tract 467. All the other well sites were ultimately dropped from oil company drilling plans.

This overall high concurrence rate will undoubtedly change unless legislation is enacted to overcome the Supreme Court's decision. Court injunctions allowed the Interior Department to accept bids, but not sell leases on the disputed tracts in Lease Sales 53 and 73. These tracts can now be leased. The injunction on Lease Sale 68 prevented Interior from receiving bids on the disputed tracts. These tracts can be offered for bid and lease at anytime. The Commission will objectively analyze oil company POEs to determine whether innovation, technology, or high-cost techniques can overcome the problems that caused the Commission to object to the tracts being offered for lease. However, it is highly unlikely that all of these problems can be resolved, so the Commission will probably be objecting to many more POEs in the future.

Development and Production Plans. As is the case with POEs, the authority of coastal state management agencies to review oil company development and production plans (DPPs) was not affected by the Supreme Court decision. The Commission has reviewed seven DPPs for the installation of ten platforms and related facilities. All have received Commission concurrence. One DPP was offered by Exxon in the form of two optional configurations: four platforms with an offshore terminal, and four platforms with an onshore terminal. The Commission concurred with the installation of the platforms in the "onshore" option. Exxon withdrew the remainder of the option from the Commission's consideration, and the Commission objected to the "offshore" option. Exxon appealed the Commission's objection to the Secretary of Commerce who recently determined that Exxon cannot proceed with the offshore option at this time.

In its review of these seven DPPs, the Commission has been able to secure the following major improvements in the plans before concurring with them:

Automatic collision warning devices will be installed on the platforms to reduce the risk of vessel ramming.

Pipelines and onshore faciltities needed to service different platforms owned by separate companies will be consolidated.

Companies will cooperate to clean-up and recover any oil spilled.

The planned designs for platforms, pipelines, and other facilities have been changed to avoid impacting sensitive resources and to protect commercial fishing grounds.

Pipelines rather than tankers will be used to transport crude oil to refining and market destinations.

Designated routes will be used by oil company boats to avoid conflicts with commercial fishing operations.

Technological advances will be used to reduce the air pollution emissions from a platform operations.

Special measures will be used to reduce the adverse impact of drilling fluids when discharged into the marine environment.

Need for Sequential Review. Some interests have asserted that it should not be necessary to have state coastal management agency review at each phase of the OCS leasing, exploration, and development process. In response, it is well to recall that S. 2324 would not add another level of state review: it would simply restore the first review that was eliminated by the Supreme Court decision. Thus, we do not have to speculate as to why all three reviews are necessary. We simply have to look at what states have been able to accomplish using the three reviews that were available to them until a few months ago.

The issues faced at each level of review are different, and difficult if not impossible to successfully resolve at an earlier or later review.

Leasing. At the lease sale stage, it is possible to establish a broad overall strategy for subsequent offshore exploration and development activities. Areas can be offered for lease on a sequential basis to allow for the most efficient use of drill ships, to allow information on resource discovers to be used in developing transportation, processing, and refining strategies, and to control the pace, nature, concentration, timing, and extent of exploration so as to control the cumulative impacts of exploration which can be unacceptable if not effectively managed. Most important, planning at the lease sale stage takes place when the resources are still in public ownership, making it possible to delete entire tracts or larger areas where subsequent oil and gas activities would preclude use of rich fishing grounds, destroy scenic resources critical to a state's tourist industry, or unacceptably threaten the habitat of an endangered species. Waiting to deal with these problems until after individual oil companies have paid millions of dollars for the purchase of lease tracts will create unnecessary confusion and foster disruptive controversy. The states and the oil companies will then have to try to salvage some order and equity out of the chaos created when the federal government sells oil leases that may not, under federal law be explored or developed.

Exploration. At the exploration stage, each company has formulated its precise drilling plan which includes the exact well locations, the drill rig that will be used, and the duration of the exploration. This information is not available at the lease sale stage. By altering the timing of the drilling, employing a particular type of drilling vessel with specific equipment, or slightly altering the number or location of the wells, it is possible to overcome conflicts with commercial fishing operations, protect critical resources, reduce air pollution, improve the chances of dealing with an oil spill, and solve many other problems.

Development. At the development stage, the company knows the location and extent of the petroleum resources, it wants to produce. With this data, the location of the platform can be established, the quantity, quality, and rate of the production determined, and the necessary transportation, processing, and support facilities designed. This information is not available until the exploration phase is complete. Therefore, it would be impossible to deal with all of the issues at one point. In fact, the Commission has found that some oil companies find it difficult to deal with all the transportation and production aspects of their proposals even at this last stage because their planning has not yet progressed that far. Thus, any efforts to fully deal with all exploration and development issues at the lease sale stage would be futile.

Inland Issues. The Commission has been extremely prudent in its use of the federal consistency authority to review federal activities inland of the coastal zone. There are two reasons for this. First, each coastal state is responsible for establishing its own inland coastal zone boundary. Therefore, the boundary typically encompasses most areas where activities that impact coastal resources are located. Thus, impor-

tant private, local, or state-sponsored projects come under the Commission's state regulatory authority. Furthermore, the Supreme Court decision did not eliminate the Commission's authority to review federal activities and projects within the coastal zone. Nevertheless, because some federal projects are of a size and scope far exceedng anything possible for a private, local, or state interest to support, federal activities inland of the coastal zone boundary can have significant impacts on coastal resources.

The second reason that the Commission and other state coastal management agencies have been so prudent in the use of this authority is because we recognize that Congress did not intend that we use the authority granted to states in a parochial fashion. We are acting as quasi-federal agencies and we have a responsibility to protect the national interest. Therefore, it would be irresponsible for a state coastal management agency to use its authority to stop an important federal project on the speculative ground that it might have some theoretical affect on coastal resources. As a result of our careful use of this authority, I do not know of any case where Congress has expressed concern that a state has abused this authority in dealing with any federal projects over the past several years. I believe that had there been such cases, Congress would have revised the CZMA to deal with this problem. Since no such problems have existed, there is little justification for Congress to accept the Supreme Court's limitation on the theory that there might be some abuses in the future.

There are only three cases where the Commission has used its consistency authority to review federal activities inland of the coastal zone. All of the activities are on federal property that is, for the most part, within the coastal zone, but which extends a short distance inland. The three cases are:

U.S. Forest Service Oil and Gas Leasing. In 1983, the Forest Service made recommendations to the Bureau of Land Management, which proposed to sell 61 oil and gas leases in the Los Padres National Forest along the Big Sur coast. Some of the lease offerings were within the coastal zone and some were inland of the coastal zone boundary. The Commission concurred with the recommendation of the Forest Service to sell 53 of the leases, and to delete eight wells which would be near the ocean and well within the coastal zone.

U.S. Forest Service Vegetation Harvesting. In 1984, the Forest Service proposed to remove vegetation in the Los Padres National Forest for the purpose of reducing fire hazards. Because the area to be cut was within the watershed of a coastal stream, the Commission reviewed the proposal and concurred with it. A small fraction of the area of concern extended a short distance inland of the coastal zone.

U.S. Army, Monterey Presidio Master Plan. As part of its long-range planning for the Presidio of Monterey, the Army has prepared a general master plan and submitted a consistency determination for the entire base development a short time ago. As a convenience to the Army, the Commission has agreed to review these master plans to provide overall guidance and to avoid the need for reviewing individual development projects. The unique geography of the Monterey Peninsula has resulted in both ends of the Presidio being within the coastal zone, while the central part of the property is outside the zone. The Commission has not yet acted on this consistency certification, but the staff is recommending concurrence.

In conclusion, I believe it would be sound public policy for Congress to enact legislation to correct the Supreme Court by clarifying the intent of the Congress in approving the CZMA. I hope this information will assist you and your colleagues in your consideration of S. 2324.

Sincerely,

MICHAEL L. FISCHER,
Executive Director.

AMERICAN FARM BUREAU FEDERATION,
Washington, D.C., March 28, 1984.

Hon. BOB PACKWOOD,
Chairman, Senate Commerce, Science, and Transportation Committee, Dirksen Senate Office Building, Washington, D.C.

DEAR CHAIRMAN PACKWOOD: Farm Bureau is the nation's largest organization of farmers and ranchers, representing more than three million member families.

We strongly oppose action which will cause delays in the Outer Continental Shelf (OCS) leasing program.

Farm Bureau believes that it is imperative that our nation immediately develop all possible sources of energy. Adequate and consistent supplies of energy are criti-

cal if agriculture is to continue to meet our nation's demands for food and fiber. Farmers and ranchers are dependent on portable liquid fuels for the production nad transportation of agricultural commodities and supplies. At present, no alternative sources of energy are available to run the equipment of the modern day farm. According to the U.S. geological survey, the OCS is one of the most promising areas for exploration and development of petroleum and natural gas resources. Delays in the leasing process would adversely affect farmers by increasing production costs and further depressing the farm economy.

The five-year OCS leasing plan was a bipartisan effort to provide a comprehensive, rational approach to off-shore oil and gas development which holds great potential for our future hydrocarbon reserves. In recognition of this fact, Congress enacted the 1978 amendments to the OCS Lands Act providing for close consultation between the federal government and affected coastal states in balancing resource potential with environmental and other interests. We believe this is a well thought-out and workable process. It is in no one's best interest for this plan to be interrupted while our country continues to import billions of barrels of oil.

We urge you to oppose any efforts to delay or interrupt the OCS plan.

Thank you for considering Farm Bureau's views.

Sincerely,

JOHN C. DATT,
Secretary and Director, Washington Office.

STATE OF FLORIDA,
OFFICE OF THE GOVERNOR,
Tallahassee, FL., April 2, 1984.

HON. BOB PACKWOOD,
Chairman Senate Committee on Commerce, Science, and Technology, Dirksen Senate Office Building, Washington, DC

DECAR MR. CHAIRMAN: I want to convey to you Florida's strong support of the Coastal Zone Management Act (CZMA) Amendments in Senate Bill 2324 and Florida's concerns relating to the potential adverse effects of the United States Supreme Court decision in *Secretary of the Interior* v. *California,* Case No. 82–1326 (January 11, 1984).

The need for cooperation between states and the federal government on sound management and conservation of valuable natural resources in the coastal zone has long been recognized. The enactment of the Coastal Zone Management Act in 1972 put in place the policy and programmatic framework to move the nation and states forward in achieving solutions to resource management conflicts in the coastal zone. Protection of the important resources in the nation's coastal zone was to be accomplished through the development and approval of state coastal management programs.

Through the enactment of our coastal managemen program, Florida became a partner with the federal government for cooperative managment of our extensive coastal zone and its resources. A primary motivation for our participation in this process was the authority provided to the state to review federal activities for consistency with state law. The ability of the state to review federal activities in the early stages of project decision-making is key to meaningful participation. Early resolution of conflict which may result from the state's review of such federal activities was seen as a useful tool to help avoid costly delays and litigation.

The United States Supreme Court in *Secretary of the Interior* v. *California,* Case No. 82–1326 (January 11, 1984) dealt a substantial blow to this state/federal partnership. The Court held that 16 USC § 1456(c)(1), which states: "Each federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management program," did not apply to the sale of outer continental shelf oil and gas leases because such leases do not "directly affect" the coastal zone.

While the majority opinion suggested that private bidders on OCS leases "might be well advised to ensure in advance that anticipated OCS operations can be conducted harmoniously with state coastal management programs," the Court held that consistently review was not mandated by the CZMA.

The ramifications of the high Court's opinion are not yet fully known. The holding of the Court does not appear to be limited to the facts of the case, but rather it appears to hold that the sale of an outer continental shelf oil and gas lease—generally—is not an activity which directly affects any coastal zone. The decision appears to bar states such as Florida from asserting any right to review proposed oil and gas lease sales for consistency with its federally approved coastal management program.

The danger exists that the opinion will be interpreted even more broadly and not

be limited to the subject of OCS oil and gas lease sales. In the body of the majority opinion outside of the holding itself, Justice O'Conner stated:

"We need not, however, decide whether any OCS activities other than oil and gas leasing might be covered by § 307(c)(1), because further investigation reveals that in any event Congress expressly intended to remove the control of OCS resources from CZMA's scope."

This broad statement lends itself to the interpretation that possibly all activities conducted on the OCS are outside the scope of the CZMA and the state's consistency review. Apparently Chemical Waste Management, Inc. is attempting to so construe the opinion because they have filed a memorandum with NOAA claiming its permit applications to incinerate hazardous wastes at sea are not subject to state consistency review because the activity would occur on the outer continental shelf.

The Court's exclusion of OCS oil and gas lease sale activities from consistency review is a severe blow to the state's right to guide federal activity in the waters adjacent to the state's coastal zone. The expansion of that opinion to cover such wide ranging activities as ocean incineration of hazardous wastes, site designation for ocean dumping of radioactive, toxic or solid wastes, fishery management plans, siting of energy facilities, and ocean mineral mining, merely because they occur on the OCS and irrespective of their potential catastrophic effects on a state's coastal zone is unacceptable.

In fisheries management, consistency review is particularly valuable for ensuring comprehensive and even-handed measures for protection of Florida's marine resources. The very migratory nature of fish and their lack of adherance to governmentally drawn boundaries mandate cohesive management schemes. This goal was enhanced by passage of the CZMA and Florida's Coastal Management Program. This goal is thwarted to the extent the U.S. Supreme Court decision may be contrued to exempt federal fishery management plans from consistency review.

Prior to passage of the Magnuson Fishery Conservation and Management Act, the federal government played only a minor role in regulation of fisheries in coastal waters. Since 1976, implementation of federal regulations in federal waters has been subject to the consistency provisions of the CZMA. This process has been beneficial both to the nation's marine resources and to state/federal relations. Consistency review has enabled the federal government to explore state management schemes and thereby avoid unnecessary duplication of fishery regulations. At the same time, the integrity of state regulations has been maintained. Congress should ensure the continuation of this balance of authority and cooperation between state and federal officials.

It is imperative that Congress take prompt action on SB 2324 to reverse the deleterious effect of this opinion. Although the bill does not expressly state that federal activity on the OCS is within the scope of CZMA, it does specifically cover federal activity "seaward of the coastal zone." The legislative history of this bill will also clearly reflect Congress' intent to include activities on the OCS.

The language of the bill appropriately encompasses federal activity outside the coastal zone which would start a chain of events likely to result in a direct effect on the coastal zone. However, the tests set forth in Subsection (c)(1)(A)(ii), which excepts federal actions taken in the name of national security from full consistency with approved state plans, appears to be far to vague. Such a broad exemption could invite unintended abuses by federal agencies and encourage litigation to obtain judicial interpretations of the term national security. Significant tightening of the proposed exception would guide federal agenies in carrying out their responsibilities for consistency review as contemplated by Congress in the CZMA.

In conclusion, the U.S. Supreme Court decision in *Secretary of the Interior v. California* unacceptably narrows the scope of state consistency review. The state is placed in the posture of being unable to raise critical concerns to proposed federal activity during the early planning stages of a project. Instead, the state must wait until substantial resources of time, energy and money have been invested by government and private industry. State refusal to certify consistency after such investments have been made will undoubtedly result in adversarial, litigious relationships between state and federal governments and private industry.

The legislation pending in the Senate is essential to counteract this opinion. We strongly support your efforts to restore the productive federal/state relationship necessary to the effective management of the nation's coastal resources.

I would appreciate inclusion of this letter in the Committee's hearing record on this important subject. Thank you for your attention to the concerns of the State of Florida.

Sincerely,

BOB GRAHAM, *Governor.*

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